

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 234

AMERICAN RAILROAD COMPANY OF PENNSYLVANIA
PLAINTIFF IN ERROR

vs.
JAN ELIZABETH KIRCH AND HERBERT T. KIRCH

ON PETITION FOR WRIT OF HABEAS CORPUS
FROM THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

FILED JANUARY 2, 1912

(1912)

(22,055)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 224.

AMERICAN RAILROAD COMPANY OF PORTO RICO,
PLAINTIFF IN ERROR,

vs.

ANN ELIZABETH BIRCH AND ERNEST VICTOR BIRCH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
PORTO RICO.

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which was then and there running through the city of Aguadilla, and that while the deceased was thus engaged and the train was thus running, one of the wheels of a freight car upon the top of which deceased was riding, broke; that the deceased at once applied his brake with all of his strength, and at once signalled the engineer to stop the train; that said train was running at a high rate of speed, contrary to the ordinances of the city of Aguadilla, and that notwithstanding the signals of said deceased to said engineer to stop said train, and the energetic application of the brake by deceased, the train ran between three and four hundred yards after said

3 brake was applied and said signals to stop given, at which time and place and while the train was still in motion, the body of the car left its trucks and was thrown to the ground crushing the deceased beneath it and thus causing instant death.

III.

The plaintiff alleges the death of her said husband to have been caused by the negligence of the defendant in failing to cause a proper inspection of the wheels of said car, which said inspection would have discovered the unsafe condition of the wheel in question, and further because of the high rate of speed at which said train was running in violation of the ordinances of said city, for that had said train been limited in its speed to the requirements of the law, the same might and would have been stopped before the accident occurred.

IV.

That the deceased Francisco Abraham Birch, was forty-seven years of age, was receiving forty-two dollars per month, was a skilled and efficient railroad employee and at the time of his death was in vigorous health and strength; and further that the death of said Birch was caused without any negligence whatsoever upon his part, but that on the contrary, he was killed while at his post and while in the faithful discharge of his duty.

Wherefore, plaintiff demands judgment against the defendant for the sum of ten thousand dollars and for the costs and disbursements in this action incurred.

(Signed)

SWEET AND WILCOX,
Attorneys for Plaintiff.

4 UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Ann Elizabeth Birch, being first duly sworn, says: I am the plaintiff named in the foregoing action; I have read the said complaint and know the contents thereof and the same is true of my own knowledge except as to the matters and things therein set forth upon information and belief and as to those matters and things, I believe it to be true.

ANN ELIZABETH BIRCH.

Subscribed and sworn to before me, this 11 day of May, 1909.

No. 32.

MANUEL F. ROSSY. [SEAL OF NOTARY.]

Demurrer to Complaint.

(Filed May 21, 1909.)

ANN ELIZABETH BIRCH, Plaintiff,

vs.

AMERICAN RAILROAD COMPANY OF PORTO RICO, Defendant.

5 Now comes the American Railroad Company of Porto Rico, defendant in the above entitled cause, by its attorney F. L. Cornwell and demurs to the complaint of Ann Elizabeth Birch and for cause of demurrer alleges:

I.

That the complaint does not state facts sufficient to constitute a cause of action.

II.

That the complaint fails to state in what legal capacity plaintiff sues defendant company.

III.

That complaint fails to state in what way plaintiff has been damaged.

IV.

That there is no law or ordinance limiting speed of trains.

V.

That the complaint shows on its face that it can only be maintained under employer's liability act and under the terms of said act no cause of action is stated.

Wherefore the defendant prays judgment that the action may be dismissed and that the defendant go hence without day and recover his costs.

(Signed)

F. L. CORNWELL,
*Attorney for Defendant.**Journal Entry.*

August 24th, 1909.

No. 633. Law.

ANN ELIZABETH BIRCH

vs.

AMERICAN RAILROAD COMPANY OF P. R.

6 The demurrer to the complaint in this cause comes on to be heard, F. L. Cornwell appearing for the demurrer and Willis Sweet against the same. The Court hears the argument and at the end thereof sustains the demurrer in part and directs counsel to

so amend the complaint as to show whether or not the plaintiff is the sole heir of the deceased, or if she sues for the benefit of certain other heirs, then the complaint must specifically state the name of said other heirs and state under what law the said action is brought. To which action of the Court in permitting the complaint so to be amended, counsel for the defendant Company then and there duly objects and excepts.

It is thereupon agreed between counsel that this case shall be tried at the coming October 1909 Term of this Court, counsel for the defendant agreeing to plead issuably to the amended complaint on or before November the first next, regardless of any rights he may have under the rules for a longer time in which so to do.

Amended Complaint.

Filed September 25th, 1909.

At Law.

ANN ELIZABETH BIRCH and ERNEST VICTOR BIRCH, Plaintiffs,
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO, a Corporation,
Defendant.

Now comes Ann Elizabeth Birch, and Ernest Victor Birch, the above named plaintiffs, by their attorneys, Willis Sweet and E. B. Wilcox, and say that they are loyal subjects of the King of
7 Denmark, at this time residing in San Juan, Porto Rico, and that the defendant is a corporation, duly organized under the laws of the state of New York, with its principal office in San Juan, Porto Rico, and thereupon for cause of action, the plaintiffs say:

I.

That Elizabeth Birch is the widow of Francisco Abraham Birch, and Ernest Victor Birch, twenty-four years of age, is the son of said Abraham Birch, deceased, and that said Elizabeth Birch and Ernest Birch are the only heirs of said Abraham Birch, deceased; and that the said Abraham Birch on the 2nd day of April, 1909, while serving as an employee of the defendant, in the capacity of brakeman, at the City of Aguadilla, in the District of Aguadilla, Porto Rico, met his death, as plaintiffs aver, through the inexcusable negligence of the defendant.

II.

Plaintiffs further say that at the time said Francisco Abraham Birch was killed, he was at his post of duty as a brakeman on a train of the defendant, which was then and there running through the city of Aguadilla, and that while the deceased was thus engaged and the train was thus running, one of the wheels of a freight car upon the top of which deceased was riding, broke; that the deceased at

once applied his brake with all of his strength, and at once signaled the engineer to stop the train; that said train was running at a high rate of speed, contrary to the ordinances of the city of Aguadilla, and that notwithstanding the signals of said deceased to said engineer to stop said train, and the energetic application of the brake
8 by deceased, the train ran between five and six hundred yards after said brake was applied and said signals to stop given, at which time and place and while the train was still in motion, the body of the car left its trucks and was thrown to the ground crushing the deceased beneath it and thus causing instant death.

III.

The plaintiffs allege the death of said Birch to have been caused by the negligence of the defendant in failing to cause a proper inspection of the wheels of said car, which said inspection would have discovered the unsafe condition of the wheel in question, and further because of the high rate of speed at which said train was running in violation of the ordinances of said city, for that had said train been limited in its speed to the requirements of the law, the same might and would have been stopped before the accident occurred.

IV.

That the deceased, Francisco Abraham Birch, was forty-seven years of age, was receiving forty-two dollars per month, was a skilled and efficient railroad employee and at the time of his death was in vigorous health and strength; and further that the death of said Birch was caused without any negligence whatsoever upon his part, but that on the contrary, he was killed while at his post and while in the faithful discharge of his duty.

V.

9 Plaintiffs declare that this action is based upon an Act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroads to their employers in certain cases, Approved April 22, 1908." And plaintiffs further say that said Ernest Victor Birch the son of deceased, was poor in health and frail in body, and was dependent upon deceased for support.

Wherefore, plaintiffs demand judgment against the defendant for the sum of ten thousand dollars and for the costs and disbursements in this action incurred.

(Signed)

ANN ELIZABETH BIRCH.
SWEET AND WILCOX,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Ann Elizabeth Birch, being first duly sworn says: I am one of the plaintiffs named in the foregoing action; I have read the said complaint and know the contents thereof and the same is true of my own knowledge except as to the matters and things therein set forth upon

information and belief and as to those matters and things, I believe it to be true.

(Signed)

ANN ELIZABETH BIRCH.

Subscribed and sworn to before me this 25 day of Sept., 1909.

[Seal of the U. S. District Court for P. R.]

(Signed)

JOHN L. GAY,
Clerk Dist. Court of the U. S. for P. R.,
By C. A. DAVIDSON, *Deputy.*

Answer to Amended Complaint.

Filed Nov. 16th, 1909.

Law. No. —.

ANN ELIZABETH BIRCH and ERNEST VICTOR BIRCH, Plaintiffs,
vs.
AMERICAN R. R. CO. OF P. R., Defendant.

10

I.

Defendant Company admits that it is a corporation as in said petition alleged, but denies that either of the plaintiffs are loyal subjects of the Kingdom of Denmark.

II.

Defendant Company denies that plaintiffs, or either of them, are the heirs or heir of Francisco Abraham Birch.

Defendant admits that Francisco Abraham Birch was an employee of defendant Company but denies that he met his death through any negligence of said defendant Company.

III.

Defendant admits the killing of Francisco Abraham Birch but denies that his death was caused by any negligence on the part of defendant.

Defendant further denies that said train was running at a high rate of speed, or contrary to any ordinance of the City of Aguadilla.

Defendant further denies that said Birch applied any brake for the purpose of stopping said train or gave any signals for the purpose of stopping same, or that said train ran five or six hundred yards after breaking of wheel, or that body of car left trucks of same.

IV.

Defendant denies the allegation that it failed to cause the inspection of the wheels of said car, but alleges that the wheels of said car were regularly and accurately inspected and tested and that no defect was visible nor could any defect be ascertained by said inspection.

11 Defendant likewise denies that said train was running at a high rate of speed or contrary to the ordinances of the City of Aguadilla or the laws of Porto Rico.

V.

Defendant denies all the allegations contained in paragraph four (4) of amended complaint.

VI.

Defendant denies that said Ernest Victor Birch was in poor health, frail in body and dependent on Francisco Abraham Birch for support. On the contrary, defendant alleges that said deceased did not contribute to the support of said Ernest Victor Birch at the time of the death of the said Francisco Abraham Birch.

VII.

Defendant alleges that no administration proceedings have been had on the Estate of Francisco Abraham Birch and that neither one of the plaintiffs have been declared his heirs as required by the laws of Porto Rico.

VIII.

Defendant alleges that said Ernest Victor Birch is over the age of twenty-one (21) years and that deceased was under no legal obligation to support him.

Wherefore, defendant prays judgment and costs in this behalf expended.

(Signed)

F. L. CORNWELL,
*Attorney for American Railroad Com-
pany of Porto Rico.*

Vicente Fano makes oath according to law, deposes and says: That he has read the foregoing petition and that it is in point of fact true to the best of his knowledge and belief.

(Signed)

VICENTE FANO.

12 Subscribed and sworn to before me on this 16th day of November 1909.

(Signed)

JOHN L. GAY,
Clerk of the United States District Court for P. R.

Journal Entry.

December 13, 1909.

No. 633. Law.

ANN ELIZABETH BIRCH et al.

vs.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

This cause comes on for trial, and come the plaintiffs in their own proper persons and represented by their counsel Messrs. Sweet &

Wilcox, and comes the defendant by its representative Geo. S. Finley and by its counsel F. L. Cornwell. Thereupon counsel for defendant moves to strike from the files a certain amended complaint filed under date of November 24, 1909, he alleging that same was filed without permission of the court and without due notice to counsel, and the Court being advised in the premises orders that the said amended complaint be so stricken from the files. Thereupon, on motion of counsel for the defendant, the demurrer to the original complaint which was overruled, is considered as a demurrer to the amended complaint filed under date of September 25, 1909, and as such is again overruled. Thereupon, it appearing that there are not

sufficient jurors to form a complete panel, the Court directs
13 the Marshal to summon additional qualified persons to complete the same. Thereafter come R. L. Miller and F. M.

Rogers who, after being duly sworn to answer questions, are found qualified to serve as jurors, and they take their place in the box, and the panel being thus completed, counsel for the parties exercise the challenges allowed them by law and the jury to try the cause remains as follows: José V. Berrios, John A. Wilson, Karl E. Swiggett, Federico Porrata, John Gardner, Luis Guillermet, A. Holst, S. Morgan, José L. Maduro, Henry C. Leonhardt, Angel Llitas, and E. Freiheit, twelve good and lawful men chosen from the body of the District of Porto Rico, duly sworn, examined and impaneled to try the issues joined between the parties. Thereupon the witnesses are called, duly sworn and placed under the exclusion rule, and the trial of the cause is proceeded with. Whereupon counsel for the plaintiffs present a certificate from the proper Insular Court in which it is certified that plaintiffs herein, Ann Elizabeth Birch and Ernest Victor Birch, are the legal heirs of the deceased Francisco Abraham Birch. Counsel for the defendant objects to the admission of said certificate on the ground that the same was issued by the Insular Court since the filing of this suit. After hearing counsel for the parties in that regard, the Court admits said certificate and rules that the mother and son having been declared by a competent court to be the only heirs of the deceased, that they are competent to bring this suit in their own names without the necessity of having a per-

sonal representative or administrator appointed for that purpose.
14 pose. To which action of the Court, counsel for the defendant duly objects and excepts. The trial is therefore again proceeded with, and not being finished at the adjournment hour, the further hearing of the same is continued over till to-morrow morning, the jury being permitted to retire in the meantime under proper instructions from the court.

Journal Entry.

December 14, 1909.

No. 633. Law.

ANN ELIZABETH BIRCH et al.

vs.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

The trial of this cause is proceeded with as on yesterday, parties and counsel present as before, the jury being called and all found present. And after the trial has proceeded for a time, counsel for the plaintiff offers in evidence a certain document purporting to be a copy of an Ordinance of the City of Aguadilla. Counsel for the defendant objects to the admission of said document, and the court being fully advised in the premises sustains the objection, to which action of the court counsel for the plaintiffs duly object and except. And thereafter, at the end of plaintiffs' case, counsel for the defendant moves the Court for an instruction to the jury for a verdict in behalf of his client. The Court hears the statement of counsel in support of said motion, and at the conclusion thereof, being fully advised, denies and overrules the same, to which action of the court counsel for the defendant duly objects and excepts. The trial
15 is thereupon proceeded with, and at the conclusion of the testimony of the witnesses in the cause, counsel for the parties present their arguments to the jury, the Court delivers to them its instructions, and they retire to their room to consider of their verdict.

And thereafter the Court, having waited several hours, directs that in case the jury shall arrive at an agreement at a later hour, that their verdict shall be sealed and delivered to the Marshal, and that the said jury may then be permitted to separate during the night, they to appear again on the opening of court to-morrow morning, to witness the opening of, and to deliver their verdict.

Journal Entry.

December 15, 1909.

No. 633. Law.

ANN ELIZABETH BIRCH et al.

vs.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Comes now the jury in this cause, and after being called and all found present the Marshal hands to the Court a sealed verdict heretofore rendered by said jury and delivered to him in pursuance of the Court's order of yesterday in that regard. The Court thereupon,

in the presence of the jury and counsel for the parties, opens and reads the verdict, which is as follows:

"We, the jury, find for the plaintiff Ann Elizabeth Birch and assess her damages at the sum of \$2,000.00 and as to the plaintiff Ernest Victor Birch we find for the defendant.

JOHN A. WILSON, *Foreman.*"

The Court thereupon asks the jury if this is their verdict, to which they all respond that it is. Whereupon it is ordered that the said verdict be filed and recorded, and the jury is discharged from the further consideration of the cause.

Wherefore it is ordered and adjudged that the plaintiff Ann Elizabeth Birch do have and recover of and from the defendant The American Railroad Company of Porto Rico, the sum of two thousand dollars (\$2,000.00), together with her costs in this behalf laid out and expended, to be taxed, with interest from this date on the principal sum at the rate of six per centum per annum until paid, and that she have execution therefor.

And it is further ordered and adjudged that the defendant herein the American Railroad Company of Porto Rico, go hence without day by reason of the writ of the plaintiff Ernest Victor Birch, and that it do have and recover of and from the said plaintiff its costs herein laid out and expended as to him to be taxed, and that it have execution therefor.

Thereupon counsel for the plaintiff move for an order to tax the costs of certain witnesses for the plaintiffs who were summoned to appear at a former setting of this cause for trial, he alleging that the postponement of the trial was upon request, and for the convenience of counsel for the defendant alone. The Court declines to pass upon the matter at this time, but states that counsel may call the same later for consideration.

17

Journal Entry.

(December 27, 1909.)

633. Law.

ANN ELIZABETH BIRCH et al.

vs.

AMERICAN RAILROAD COMPANY OF PORTO RICO, a Corporation.

In this cause the matter of the motion for taxation of additional costs recently filed came on to be heard, Willis Sweet appearing for the motion and N. B. K. Pettingill for F. L. Cornwell against the same. After the argument, the Court being advised, grants the motion and it is therefore:

Ordered that the legal costs of the plaintiff for bringing his witnesses to Court for a trial of this cause at a setting thereof, which setting was rendered unavailing by the application of counsel for the defendant for a postponement of the trial, be taxed in favor of said witnesses for the plaintiff.

Thereupon the matter of the fixing of the amount of a supersedeas bond in the case on appeal comes on to be heard, the said Pettingill again appearing for and on behalf of said F. L. Cornwell and moving therefor, and the Court being advised, and Willis Sweet, attorney for the plaintiff being present and agreeing thereto, it is:

Ordered that the amount of the bond to stand as a supersedeas in the premises on appeal to the Honorable the Supreme Court of the United States under its writ of error be, and the same hereby is fixed at the sum of Three Thousand Dollars (\$3,000), the same to be conditioned, approved and filed in the manner and within the time required by law.

19 *Journal Entry.*

December 29, 1909.

No. 633. Law.

ANN ELIZABETH BIRCH et al.

vs.

AMERICAN RAILROAD COMPANY OF PORTO RICO.

Order.

Upon application of F. L. Cornwell, counsel for the defendant herein, the time in which a transcript of the record on writ of error may be presented for approval is fixed at sixty days from the date of the judgment heretofore entered in this cause.

B. S. RODEY, Judge.

20 *(Petition for Writ of Error.)*

Filed Feb. 1, 1910.

ANN ELIZABETH BIRCH and ERNEST VICTOR BIRCH, Plaintiffs,

vs.

THE AMERICAN RAILROAD CO. OF PORTO RICO, Defendant.

Petition for Writ of Error and Supersedeas by Defendant, American Railroad Company of Porto Rico.

American Railroad Company of Porto Rico, defendant in the above entitled cause feeling itself aggrieved by the verdict of the jury and the judgment entered on the 15th day of December, 1909, comes now by Frederick L. Cornwell its attorney and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the Supreme Court of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error and upon the giving of said security all further proceedings in said Court be suspended and stayed until the determination of said

writ of error by the Supreme Court of the United States. And your petitioner will ever pray.

F. L. CORNWELL,
Attorney for Defendant.

21

(Order. Filed February 4, 1910.)

ANN ELIZABETH BIRCH and ERNEST VICTOR BIRCH, Plaintiffs,
vs.
THE AMERICAN RAILROAD CO. OF PORTO RICO, Defendant.

Order Allowing Writ of Error.

At a Stated Term, to wit, the October term, 1909, of the United States District Court for the District of Porto Rico, Held at Chambers in the City of San Juan, Porto Rico, on the 4th Day of February, 1910.

Present: The Honorable B. S. Rodey, District Judge.

Upon motion of Frederick L. Cornwell, Esq., attorney for defendant and upon filing a petition for a writ of error and an assignment of error, it is ordered that a writ of error be and hereby is, allowed to have reviewed in the United States Supreme Court the judgment heretofore entered herein and the amount of the bond on said writ of error be, and hereby is, fixed at three thousand dollars, the same to act as a supersedeas.

B. S. RODEY, *Judge.*

22

(Entry. February 4, 1910.)

(At Chambers.)

633. Law.

ANN ELIZABETH BIRCH and ERNEST VICTOR BIRCH
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

And now on this fourth day of February, 1910, at chambers appear N. B. K. Pettingill representing F. L. Cornwell, the counsel of record for defendant, and Willis Sweet, one of the counsel for plaintiffs, and request the Court to settle the bill of exceptions herein, which said counsel representing the defendant is prepared to present, and the said counsel for the defendant states that he has appeared to apply for a writ of error as heretofore requested, and:

Thereupon the said Willis Sweet offers to said counsel representing the defendant in the presence of the Court to submit to a new trial in the premises, but such offer is then and there by said counsel for the defendant declined.

Whereupon the bill of exceptions in the premises was duly presented, examined by both counsel and considered by the Court and

then duly signed and settled and ordered to be filed and transmitted in due course of law to the Honorable the Supreme Court of the United States.

B. S. RODEY, *Judge.*

23 (Filed Feb. 1, 1910.)

ANN ELIZABETH BIRCH and ERNEST VICTOR BIRCH

vs.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Assignment of Errors.

I.

That said Court erred in overruling in part original demurrer to original complaint.

II.

That said court erred in overruling the defendant's demurrer to amended bill of complaint.

III.

That said court erred in overruling defendant's motion to dismiss the suit on the ground of same was not brought by proper parties and not by the personal representative as required by the United States statutes.

IV.

That said court erred in admitting certificate of the District Court of San Juan showing plaintiffs to be the heirs of deceased Francisco Birch.

V.

That said court erred in allowing Ernest Victor Birch to be made a party plaintiff.

24

VI.

That said court erred in admitting testimony as to the physical condition of co-plaintiff Ernest Victor Birch and as to the fact of whether or not he was dependent upon Francisco Birch for support and maintenance.

VII.

That said court erred in holding that heirs could sue in their own name and as heirs in this cause of action.

VIII.

That said court erred in allowing evidence as to the rate of speed of the train which is alleged to have caused the death of Francisco Birch.

IX.

That said Court erred in permitting plaintiff to introduce evidence showing what people are alleged to have said when the train was running through Aguadilla at or near the point of the accident.

X.

That said court erred in permitting plaintiff to introduce testimony showing speed generally of said train.

XI.

That said court erred in denying the motion of counsel for defendant for the direction of a verdict in this case upon the following grounds:—

1. On the ground that the plaintiffs have not made out any case showing that the company has been guilty of any negligence.
25 2. Upon the ground that the suit is not brought by any person authorized under the national employers' liability act to bring such a suit.

3. Upon the ground that there is not sufficient evidence to support a verdict in favor of the plaintiffs even though the jury should return one.

4. On the further ground that the plaintiff's own evidence shows that the train in question was always under the control of the engineer and that it could have been stopped at any point, and that it was not running at an unreasonable speed.

5. On the further ground that the death of said Birch, as shown by the plaintiff's own evidence, was caused by his own negligence and not that of the defendant company.

6. On the further ground that the evidence shows clearly that the death of said Birch was the result of an unavoidable accident due to a latent defect in the wheel of said car and was not due to any negligence on the part of said company.

7. And upon the further ground that the suit shows that it is one in favor of the estate of the deceased, when no such action survives under the national employers' liability act.

8. Upon the grounds that the suit as originally filed in this court was between Ann Elizabeth Birch as plaintiff and the American Railroad Company as defendant, and without any permission of the court or previous order of the court, a new cause of action was stated by the addition of a co-complainant Ernest Victor Birch.

26 9. And upon the further ground that the evidence shows that said Ernest Victor Birch was not a minor nor wholly dependent upon the deceased for support; and that it further shows that since his majority, at least for a major portion of his time, he was at work at gainful occupations.

XII.

That said Court erred in failing to grant motion to direct verdict made at close of plaintiff's case and renewed at close of the whole case.

XIII.

That said court erred in applying the national safety appliance act to this action.

XIV.

That said court erred in giving the following instructions:—

1. You are instructed that there is no question about the widow of the deceased being a proper plaintiff in this cause.

2. But if you shall believe from a preponderance of the evidence that the violation by the defendant of the law of Congress requiring it to have safety appliances upon its trains and cars contributed to the death of the deceased, or was the proximate cause thereof, then you cannot hold that the deceased was guilty of any contributory negligence at all under the law, nor can you hold that the deceased assumed any risks of his employment, if you shall thus believe that the absence of safety appliances in and about the train contributed to, or was the proximate cause of the injury.

27 3. You are instructed, gentlemen, that if you believe from a preponderance of the evidence, considering the same as honest practical men, and after a full, fair and impartial consideration of all the facts and circumstances of the case, that this accident occurred solely because of a latent defect in one of the wheels on one of its cars which could not by the exercise of reasonable care commensurate with the dangerous character of the machinery involved, have been discovered and prevented, then the same was what is known in law as an unavoidable accident and no person is responsible therefor, and you should in such case unhesitatingly find for the defendant.

4. Three forms of verdict will be given you, gentlemen. One will read: we, the jury, find for the plaintiff Ann Elizabeth Birch and assess her damages at the sum of blank dollars; and we also find in favor of the plaintiff Ernest Victor Birch and assess his damages at the sum of blank dollars. The second will read: we, the jury, find for the plaintiff Ann Elizabeth Birch and assess her damages at the sum of blank dollars; and as to the plaintiff Ernest Victor Birch, we find for the defendant. And the third one will read: we, the jury, find for the defendant. When you have arrived at a verdict you will cause one of your number to sign it as foreman and all of you return it into court.

XV.

That said Court erred in failing to modify instructions as to compensatory damages so that they would read as follows:—

That they are entitled to recover the actual compensation that they would have received if he had not been killed and that that would be limited to the purchase of an annuity for his recognized period of life.

F. L. CORNWELL,
Attorney for Defendant.

(Supersedeas Bond. Filed Feb. 4, 1910.)

ANN ELIZABETH BIRCH and ERNEST VICTOR BIRCH, Plaintiffs,
vs.

THE AMERICAN RAILROAD CO. OF PORTO RICO, Defendants.

Know all men by these presents, that we the American Railroad Company of Porto Rico, as principal and Luis Rubert and W. Hepp, as sureties, are held and firmly bound unto the plaintiffs above named for the sum of three thousand dollars, to be paid to the said Ann Elizabeth Birch, her executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated the 1st day of February, 1910.

Whereas, the above-named defendant, American Railroad Company of Porto Rico, has sued out a writ of error to the United States Supreme Court, to reverse the judgment in the above entitled cause by the United States District Court for the District of Porto Rico.

Now, therefore, the condition of this obligation is such that if the above-named American Railroad Company of Porto Rico shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

AMERICAN RAILROAD C^Y,

[SEAL.]

By J. MERIER, *Manager*.

LUIS RUBERT.

[SEAL.]

W. HEPP.

[SEAL.]

Luis Rubert and W. Hepp, each makes oath according to law deposes and says: that he is the surety named in the above-mentioned bond and that he is worth the sum of three thousand dollars in visible property, subject to execution in Porto Rico and that he is worth said sum over and above his indebtedness.

LUIS RUBERT.

W. HEPP.

Subscribed and sworn to before me, on this the 1st day of February, 1910, in the city of San Juan, Porto Rico.

JOHN L. GAY,

*Clerk of the United States District**Court for Porto Rico.*

Approved this 4th day of February, 1910.

B. S. RODEY, *Judge*.

ANN ELIZABETH BIRCH, ERNEST VICTOR BIRCH

vs.

THE AMERICAN RAILROAD CO. OF PORTO RICO.

Bill of Exceptions.

(Filed Feb. 4, 1910.)

Be it remembered, that on the 13th day of December, 1909, at the October 1909 term of this Court, the above entitled cause came in for trial before the above Court and a jury duly empaneled.

Honorable B. S. Rodey presiding.

The plaintiffs appeared by Messrs. Sweet & Wilcox, their counsel, and the defendant appearing by Frederick L. Cornwell, its counsel and the following proceedings were had and testimony taken; an opening statement to the jury was made by Mr. Sweet for the plaintiff.

The hereinafter transcript which is made part of this bill of exceptions constitutes the testimony and statements of all the evidence introduced and offered upon the trial of this cause with the ruling and exceptions thereto. Instructions to the jury and exceptions thereto and request for instructions, refusal on part of Court and exceptions thereto, with the motion of the defendant for a direction of verdict at the close of the plaintiff's cause, order overruling same, renewal of said motion at the close of the whole evidence, order overruling same, to which said ruling of the Court counsel for the defendant then and there duly excepted.

31 In the District Court of the United States for Porto Rico.

ANN ELIZABETH BIRCH et al.

versus

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Transcript of Testimony.

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33 In the District Court of the United States for Porto Rico.

San Juan, Law. No. 633.

ANN ELIZABETH BIRCH et al.

VS.

AMERICAN RAILROAD COMPANY OF PORTO RICO.

Transcript of Testimony.

DECEMBER 13, 1909.

Mr. SWEET: We desire first to introduce an order of the district court of San Juan, Porto Rico, in which the plaintiffs are declared the only heirs, the widow and son of this deceased.

Mr. CORNWELL: I object to it on the ground that it shows that it was taken out after the beginning of this suit.

The COURT: That is no surprise. They sued you anyway.

Mr. CORNWELL: That is one of the defenses; that they did not bring the suit properly. The statute provides that the suit must be brought in the name of the administrator or executor.

The COURT: I don't think that is the language. I think it says, the personal representative. I will let it in.

Mr. CORNWELL: They have sued us generally as heirs.

The COURT: You may get some of them excluded by instructions. I am inclined to hold that it is sufficient. There is no surprise to you.

Mr. CORNWELL: It is not a question of surprise. It is a question of the proper method of bringing the suit.

The COURT: Your motion is to dismiss the whole suit on that ground?

34 Mr. CORNWELL: Yes, sir; or to amend. Plaintiffs have had several months now to amend their pleadings and have not chosen to do so.

Mr. SWEET: We had that question up on demurrer and Your Honor held with us.

The COURT: I admit that it is a close question. It is purely technical, but the statute holds that it is for the benefit of the surviving wife and children. I will admit it. I will hold that they can sue in this case.

Mr. CORNWELL: All right, note an exception.

The COURT: I would rather have it the other way but it is not the other way.

Mr. CORNWELL: I object to the continuance of the suit in the name of Ann Elizabeth Birch and Ernest Victor Birch for the reason that under the United States statute, under which the suit is brought, the suit should be brought in the name of the personal representative for the benefit of those named in the statute, and neither one of these plaintiffs has qualified as personal representative as required by the statute.

The COURT: Overruled because the intent of the act of Congress in the opinion of the Court is that this money shall be recovered, if any is recovered, for the benefit of the surviving widow or husband, and the certificate of the probate court shows that the plaintiffs are the only heirs of the deceased.

Mr. CORNWELL: Does your Honor admit that document as sufficient?

The COURT: The document is received and admitted.

35 Mr. CORNWELL: Note an objection and exception on the ground that the document does not show that they are personal representatives as required by the statute.

The document was then placed in evidence and marked: Exhibit A for the plaintiffs, and counsel read it to the jury.

ANN ELIZABETH BIRCH being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Q. Mrs. Birch, you are the widow of Francisco A. Birch, are you?

A. Yes, sir.

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. How old was your husband at the time of his death?

A. Forty-seven years.

Q. Where were you married to Mr. Birch?

A. In St. Thomas.

Q. Where in Saint Thomas?

A. In the Moravian Church.

Q. Who by?

A. By Rev. Hastings.

Q. When were you married?

A. On the 18th of October, 1883.

Q. How long had your husband been in the employ of the American Railroad Company?

A. Six years.

Q. Of what country are you a citizen or subject?

36 A. A native of Saint Thomas; Denmark.

Q. How many children have you living, Mrs. Birch?

A. One.

Q. And the name?

A. Ernest Victor Birch.

Q. Where was he born?

A. In Saint Thomas.

Q. You were born and always lived in Saint Thomas?

A. In Saint Thomas.

Q. What is the age of your son?

A. Twenty-four years.

Q. Mrs. Birch, you tell the Court and the jury of the life of your son; that is, his physical strength and health.

Mr. CORNWELL: I object to that. I cannot see the materiality of that. The son is here.

The COURT: She may tell. I am in grave doubts, the son being over age, of his right to recover here. I will take the evidence and I will instruct on it.

Mr. CORNWELL: Note me an objection and exception to each question.

The COURT: No, take it as to one and that will be sufficient.

A. My son has always been a sickly child and up to now he has always been sick with asthma. He has always been a sickly child up to now and has been troubled with asthma and never had physical strength, and he went to the States and even then he could not do the work there.

The COURT: As I understand the issue here, the evidence must go as to whether or not he was dependent upon the father's wages as his support.

Mr. SWEET: I could not very well ask leading questions but that is what I am trying to get at.

Mr. CORNWELL: Suppose he was in the past. What has that got to do with the future?

The COURT: Proceed with the examination.

Q. State to what extent, if any, your son has been dependent or was dependent upon your husband for support at the time of his death.

A. Yes, he was.

Q. To what extent?

A. When he was in New York his father always had to send money over there for him on account of his health, not being able to work.

The COURT:

Q. Was your son able to work at all? Did he have any income after he was twenty-one years of age?

A. He worked some but he could not keep up to the job. He could not keep to the work on account of his sickness.

Mr. CORNWELL: This testimony is objected to.

The COURT: I will take the evidence and I will determine before the end of this case whether this boy is entitled to recover here or not, and I will protect the defendant if he is not.

Cross-examination by Mr. CORNWELL.

Q. You say your husband sent money to support this child in New York?

A. Yes.

Q. How much a month did he send him?

A. Sometimes he sent ten dollars and sometimes five.

Q. But he sent at least five dollars every month?

38 A. No, not every month.

Q. Well, how much did he send? Some months he didn't send any whatever?

A. I have already said sometimes he sent ten dollars and sometimes he sent five.

The COURT:

Q. The boy earned some himself did he?

A. When he was able to earn it.

Q. In other words, he worked when he could and earned something?

A. Yes.

Q. What sort of work did he do?

A. He worked at translating.

Mr. CORNWELL:

Q. He sent though at least five dollars a month to this boy?

A. Yes, sometimes five and sometimes ten.

Q. How much a month did he give you?

A. How much did he give me?

Q. Yes, how much did he give you each month?

A. Yes, sir; sometimes he gave me twenty-nine dollars.

Q. And that same month he sent him ten dollars?

A. No.

Q. Or five dollars?

A. I didn't say he sent him ten dollars every month.

Q. How many months did he send him ten dollars, all his life?

The COURT: More or less, if you know.

A. About four times.

Mr. CORNWELL:

Q. He sent him about forty dollars altogether?

A. Yes.

Q. How long was your boy in New York?

39 A. A year and seven months.

Q. And during the time he was in New York he sent him forty dollars?

A. Yes.

Q. He didn't send him any more than that?

A. I never kept account of it.

Q. Well did he send him more than forty dollars, you think?

A. Oh, yes.

Q. Well how much?

A. I cannot exactly say how much.

Q. Give us some idea, Mrs. Birch. Your husband was working here six years for the railroad company and your boy was up in New York a year and seven months. Where was he the rest of the time and what did your husband supply for his support? Give us some idea.

A. He sent him about fifty dollars.

Q. In the year and seven months he sent him about fifty dollars?

A. Yes.

Q. How much did he give him while he was in San Juan?

A. He was in the house and lived with us.

Q. Did you give him his meals?

A. Yes.

Q. Your boy worked during that time didn't he?

A. When he was able.

Q. Where did he work?

A. The first place was at the cable office. During that time he was very sick. Then it was only that the people of that office was generous that they kept him there so long.

Q. How long did he work there?

A. He was there about two or three years.

Q. He didn't lose a day's time during that time; he got 40 his wages every day during the two or three years didn't he?

A. Yes.

Mr. SWEET: Hold on; that is objectionable. There are two questions there.

Q. Where did he work besides the cable office?

A. He worked, I don't remember the place, the company's name. I don't remember where the place is, but he worked there for a couple of months.

Q. What place?

A. I don't know.

The COURT:

Q. Was it in Porto Rico?

A. Yes, in Porto Rico.

Mr. SWEET: This boy will take the stand and tell all this in detail.

Mr. CORNWELL:

Q. Now you say your husband gave you some months twenty-nine dollars?

The COURT: Yes, she said that.

Q. What did she give you other months?

The COURT: How does that make any difference?

Mr. CORNWELL: For the very reason that he didn't get that much salary.

The COURT: How would it be material anyway?

Mr. CORNWELL: On the question of support and the question of damages. This is purely a compensatory statute that they are suing under.

Q. How much did he give you every month now for the maintenance of your family?

Mr. SWEET: She has not testified that he turned the money over to her.

41 The COURT:

Q. Were you living in Saint Thomas all the years while your husband was over here?

A. No, sir.

Q. You were here living with him?

A. Yes, sir.

Mr. CORNWELL: When did you come from Saint Thomas?

A. In 1900.

Q. When did you come from Saint Thomas?

A. In 1900.

The COURT:

Q. In the year 1900 you mean?

A. Yes, sir.

Mr. CORNWELL:

Q. Where did your husband work from that time until he began to work for the railroad company?

A. He worked at the lighthouse.

Q. Which lighthouse?

The COURT:

Q. Can you tell which one, Mrs. Birch?

A. No, I know that he worked at the lighthouse.

Q. Well, what salary did he get there?

A. I couldn't tell that.

Mr. CORNWELL:

Q. For the last six years he worked for the railroad, didn't he?

A. Yes.

Q. During that time how much money did he contribute monthly to your support?

The COURT: I will hear you on that now.

Mr. SWEET: I object to that question for these reasons; In the first place it is not proper cross examination, and in the second place it is assuming on the part of counsel that the witness has testified that the husband gave to her the money with which to pay the expenses of the family.

The COURT: That is not the question that is bothering me at all.

Mr. SWEET: That is what is bothering me because that is the question he has asked the witness.

The COURT: The question that is bothering me is whether the earning capacity and not the amount which he contributed to his family is the measure of damages.

This question was argued at some length by counsel for both parties.

The COURT: I will rule that this testimony is improper and that the man's earning capacity is the question that is material here.

Mr. CORNWELL: Your Honor then rules that I cannot examine her as to the amount of money that he contributed to the support of the family.

The COURT: Yes, I will rule that way because it is wholly immaterial whether he contributed or did not contribute to the support of his family. But you may ask the question.

Q. How much did your husband contribute monthly to your and your son's support?

A. Twenty-nine dollars I told you he gave me one month.

Q. One month, now what did he give you generally, every month?

The COURT:

Q. Can't you tell that in a general way, Mrs. Birch?

A. It would be hard to say. He got paid on the last and on the 15th.

Mr. CORNWELL:

Q. How much did he contribute to you then every fifteen days?

43 A. Sometimes he gave me sixteen dollars.

Q. And sometimes he gave you what?

A. And sometimes he gave me fifteen and he paid his rent.

Q. He paid his rent of the house in addition to that? Did Mr. Birch have any income outside of his railroad salary?

A. No, that was all.

Q. He was entirely dependent on what he got as a brakeman?

A. Yes.

Q. He smoked didn't he?

A. Yes.

Q. The man took a drink occasionally didn't he?

A. He never drank when he was on his work.

Q. I don't mean that he drank to excess but he was a regular drinker, he took a drink occasionally.

A. Yes.

Q. Then you mean to say that he gave you twenty-nine dollars a month and paid his rent besides and he had no other source of income except as a brakeman on that railroad?

A. Yes.

Q. And in addition to that he paid his house rent?

A. Yes.

Q. How much was his house rent, do you know?

A. Six dollars and a half.

Q. A month, and out of fifteen or sixteen dollars did you buy his clothes?

A. No, he never bought clothes every month.

Q. Well the months he bought clothes he didn't give you so much?

A. No, then he would give me twelve or thirteen dollars.

44 Q. That is for the fifteen days?

A. No, not every month.

Q. Now the months that he sent his son ten dollars, how much did he give you?

A. He gave me fifteen dollars.

Q. For that fifteen days besides sending the ten dollars to his son he gave you fifteen?

A. Yes.

Q. You are positive of that? Are you positive of that?

A. (The witness nods her head in the affirmative).

Q. And he did this during the whole six years?

A. He done what?

Q. During the whole six years he did this while he was working for the American Railroad Company?

A. Yes, he was working for the railroad six years.

Q. Did he have steady employment during the summer months?

A. He worked all the time the whole year around.

Q. He never lost any time?

A. Lost any time?

Q. Yes, during the summer months did he work steady when there was no cane?

A. He never worked in the cane.

Q. I know he didn't, but during the summer months while there was no cane, did he work steady?

A. Yes, he worked steadily.

Q. He never lost any time?

A. No.

Q. And during all that time he gave you that amount of
45 money, fifteen dollars and sixteen dollars, and during the months he bought clothes, twelve or thirteen dollars?

The COURT: That is too much. The woman has answered all of that already. Stricken out; ask is properly.

Mr. CORNWELL: Note an exception.

Q. Your son lived with you all the time that he was working for the cable company?

A. Yes.

Q. How much did he contribute to your support?

A. Who?

Q. Your son when he was working for the cable company; how much did he give you a month?

A. He had nothing to give me. It was just enough to buy his shoes and clothes. He had nothing to give me.

Q. He never paid you anything.

A. No, instead of paying me we had to give him the food and everything.

Q. How long since he has worked for the cable company?

A. Three years; I have told you that already.

Q. And after he left the cable company he went to work for McMurtrie & Guiler, didn't he?

A. Yes, a couple of months.

Q. Then he went to the States didn't he?

A. Yes.

Q. And how long did he stay in the States did you say?

Mr. SWEET: He has been all over that once, every word of it.

The COURT: That is true, she has answered that twice; two years and seven months.

Mr. CORNWELL: That is all.

46 Redirect examination by Mr. SWEET:

Q. Mrs. Birch, what did your husband receive per month, if you know?

Mr. CORNWELL: I object to that. He worked for a public service corporation and the best evidence is their pay-rolls.

The COURT: Overruled; the most common question ever asked.

Mr. CORNWELL: Note an exception.

The COURT:

Q. How much did your husband receive each month?

A. About \$42.00.

Mr. SWEET:

Q. When you told Mr. Cornwell that your husband gave you fifteen or sixteen dollars, did you mean that he gave you fifteen or sixteen dollars every fifteenth and last of the month or that he gave you so much per month?

A. No, every fifteen days; the fifteenth and the last.

Q. And he gave it to you on the fifteenth and the last of the month?

A. Yes.

Q. Who paid the bills for the support of the house, you or your husband?

A. My husband paid them.

The COURT:

Q. Did you pay them out of the fifteen or sixteen dollars or did he pay them over and above that? I don't know whether it would make any difference anyway.

A. (This question was not answered by the witness.)

Mr. SWEET:

Q. What did you do with the money that was given to you?

A. That money was spent in the house.

Q. Then who paid it, you or your husband?

A. My husband.

Q. Did he give the money to you and then you give it back to him?

A. No, he gave me the money and I spent it.

Q. What for?

47 A. To furnish the house.

Q. And what would you say to the jury and to the Court it would average per month, say for three years, that he gave to you for the support of the house?

Mr. CORNWELL: I object to that as calling for an opinion of the witness.

The COURT: That question is rather to your advantage and I don't see what you are objecting for.

Q. State what he paid you per month for the support of your family.

The COURT: He earned, you say, \$42.00 a month. What did he give you on an average?

A. \$29.00.

Mr. SWEET:

Q. How often was he in San Juan?

A. Not often.

Q. Where did you live; here in San Juan, Santurce, or where?

A. I lived in San Juan once a couple of years and now I am living in Santurce.

Q. Well, when your husband was living and ran on the railroad, where did you live?

A. In Santurce.

Q. How often was he home?

A. Not often; he was every day on the train, even Sundays.

Q. Didn't he ever come home at night?

A. Yes.

Q. How often?

A. One night he would sleep in Mayaguez and the next night at his home in Santurce.

Q. He was home every other night then?

A. Every other night.

48 Mr. SWEET: That is all.

Recross-examination by Mr. CORNWELL:

Q. Where did he live in Mayaguez? Where did he stop at Mayaguez, do you know?

A. I don't know.

Q. But he spent half of his time there did he?

A. Where?

Q. At Mayaguez.

A. He spent a night in Mayaguez and one in San Juan.

Q. Then he spent half his time in Mayaguez, didn't he?

The COURT: She has told you that.

Q. Now in addition to the \$29.00 he gave you each month he paid the rent of the home didn't he?

A. Yes.

Q. And he had to pay for his keep over in Mayaguez didn't he?

The COURT: Did he pay for his keep in Mayaguez?

A. I suppose so.

Mr. CORNWELL:

Q. But notwithstanding that and paying the rent, he still gave you \$29.00 a month did he?

A. Yes, I told you \$29.00.

Q. And that is in addition to paying the rent?

A. Yes, sir.

Mr. CORNWELL: That is all.

Witness retires.

49 ERNEST BIRCH being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Q. State your name and age.

A. Ernest Birch; twenty-four years old.

Q. Where were you born?

A. In Saint Thomas.

Q. Of what country are you a subject or citizen?

A. I am a subject of Denmark.

Q. When did you come to San Juan?

A. From Saint Thomas?

Q. Yes.

A. In 1900, the year 1900.

Q. How old were you then?

A. I was sixteen years old.

Q. What had you been doing up to that time?

A. In Saint Thomas?

Q. Well I don't know whether you were in Saint Thomas or where you were, but what had you been doing?

A. I went to school during that time.

Q. What did you do when you came here?

A. I got a position with the cable company.

Q. What were you doing there?

A. I was messenger.

Q. How long were you with them?

A. About three years.

Q. What was the condition of your health during that time?

Mr. CORNWELL: I object to that on the ground that it is immaterial.

50 Mr. SWEET: I expect to follow him right through all this period.

The COURT: You may ask the question.

Mr. CORNWELL: Note an objection and an exception on the ground that it is immaterial.

A. I very often suffered from my head while I was there.

Q. What was the trouble?

A. I had asthma and I used to get fever.

Q. To what extent did it use to affect your service?

A. I couldn't work for weeks at times and I had to get somebody else in my place.

Q. What was your salary?

A. Twelve and a half.

Q. You worked there about three years?

A. Yes.

Q. Where did you work then?

A. With McMurtrie, Guiler & Company.

Q. What did you do there?

A. I was office boy.

Q. What kind of work did you do?

A. To go to the post office for letters and take money to the bank.

Q. How long did you work there?

A. Four months.

Q. Why did you quit?

A. Because they were going to change me down to the storehouse and I refused because it was against me, and the chief clerk told me I could go.

Q. What was the condition of your health then?

51 Mr. CORNWELL: I object to that. The condition of his health before his father's death is absolutely immaterial. It is his condition since the death of his father.

The COURT: The condition before would go to show whether he is stating the fact as to his condition since. If your theory is right,

this boy's right to recover ended when he was twenty-one years of age.

Mr. CORNWELL: Note my objection and exception.

Q. Where did you live during the years you were working in San Juan?

A. I lived with my father.

Mr. CORNWELL: Note an objection and an exception to that on the ground that it is immaterial.

Q. What did you pay for your board?

A. I paid him nothing. He gave me my board.

Mr. CORNWELL: I object to that as immaterial and move to strike it out.

The COURT: Overruled.

Mr. CORNWELL: Note an exception.

Q. When did you go to New York?

A. I went there after my brother died.

Q. What year did you go to New York?

A. In 1907.

Q. How long did you stay there?

A. About two years.

Q. What did you do when you went to New York?

A. I worked; the first position I got was as a translator.

Q. Did you support yourself in New York?

A. Sometimes, but most of the time I was sick and had to get support from my father.

52 Q. What was your trouble?

A. Fever and asthma and I am frail physically and every few months I get sick and have to go to bed.

The COURT:

Q. Is there anything constitutionally the matter with you? Asthma is something that can be cured and fevers pass away.

A. I am very weak still and I get cured and I am sick again.

Q. How many years have you been in that condition?

A. Ever since I remember myself.

Mr. SWEET:

Q. To what extent have you been dependent upon your father for your support?

Mr. CORNWELL: We admit the dependency up to majority.

Q. How much money did your father send you?

A. He sometimes sent me five dollars and sometimes ten.

The COURT:

Q. Did he keep that up for a few months?

A. He kept it up for a good many months. He would stop off for a few months and then continue it again.

Mr. SWEET:

Q. What have you been doing since your father's death?

A. I came down here and worked in the pineapple factory for six weeks and they shut down and I have done nothing since.

Q. What did you do there?

A. I was time keeper.

Q. And when was that?

A. That was from June to July.

Q. Of last year or this year?

A. Of this year.

Cross-examination by Mr. CORNWELL:

Q. Have you been supporting your mother since your father's death?

A. No, sir.

53 Q. You have not contributed to it since then?

A. I could not make the money to do so.

The COURT:

Q. Did she support you?

A. She tried and did some work and helped support me.

Mr. CORNWELL:

Q. You say that almost every month you were in New York you received ten or five dollars from your father?

A. Yes, sir.

Mr. SWEET: He didn't say that.

The COURT: Ask the question without assuming.

Q. Well how many months did you receive money from your father while you were in New York?

A. Most every month I was in New York.

Q. How many months do you think he missed during the two years?

A. About five months.

Q. Then you received money about nineteen months?

A. About that.

Q. Did he generally send you ten dollars or five?

A. Generally ten dollars.

Q. How many months do you think you received ten dollars a month?

A. I don't remember exactly, but most of the months he sent me ten dollars.

Q. And how many months do you think he sent you five? Two, three, four or five?

A. I don't remember.

Q. Well, more or less; you must have a general idea of how much money you received from your father.

A. Call it three months.

Q. Three months you received five dollars and the other months ten?

54 A. Yes, sir.

Q. You say when you got to New York you went to work as a translator?

A. Yes.

Q. For who?

A. For H. Alexander.

Q. How long did you work for Mr. Alexander?

A. Four months.

Q. How much did you make a month?

A. I got seventy-five cents for every hundred words translated.

Q. What did your income amount to?

A. I didn't make more than about twenty-five dollars.

Q. After you left him who did you work for?

A. I got sick.

Q. How long were you sick?

A. I was sick about six weeks.

Q. Then who did you go to work for?

A. I went to work for a florist.

Q. How long did you work for the florist?

A. That job wasn't regular; I worked there about five months.

Q. How much did you make?

A. As it was not a regular job, sometimes I made fifteen or twenty dollars.

Q. Where did you go then?

A. I was sick then.

Q. How long?

A. About five weeks.

Q. Then where did you go to work?

A. Then I went to work for another florist.

Q. Where was that?

55 A. It is at 1837 East Ninth Street.

Q. How much did they pay you there?

A. Five dollars a week.

Q. How long did you work there?

A. About seven months.

Q. And then did you get sick again?

A. Yes.

Q. How long were you sick that time?

A. About five weeks.

Q. And then where did you go?

A. Then I got a job with another florist.

Q. How long did you work for that florist?

A. About two months and then I came down here.

Q. How much did you make there?

A. I made about twenty dollars a month.

Q. In addition to that you received about ten dollars a month from your father?

A. Yes, sir.

Mr. SWEET:

Q. Every month?

A. Most every month.

Mr. CORNWELL:

Q. Who paid your fare to New York?

A. My father.

Q. What steamer did you go on?

A. The steamship Caracas.

Q. He gave you that too did he?

A. Yes, sir.

Q. How much money did he give you besides paying for the ticket?

A. Ten dollars.

56 Q. What did your ticket cost you; do you remember?

A. Thirty dollars.

Q. Thirty or thirty-five?

A. Twenty dollars.

Q. Twenty dollars?

A. Steerage.

Q. There isn't any steerage on the Caracas; you went second class didn't you?

A. Yes, I went second class.

Q. Then you paid thirty or thirty-five dollars?

A. Yes.

Q. And your father gave you ten dollars in addition to that?

A. Yes.

Mr. CORNWELL: That is all.

Witness retires.

Court adjourned at this time to 2 p. m. and upon reconvening the Court made the following announcement:

The Court holds that it was right in saying that the heirs could sue in their own name in Porto Rico on this cause of action, they being held by a probate court to be the sole heirs. The Court holds that the son has a right to recover, if he is necessarily dependent on the father for his support, to the extent that he is dependent. The Court holds that the defendant has full right of cross-examination to show the earning capacity, the health, the expectancy of life and the moral character and habits and care of his family of the deceased.

Mr. CORNWELL: To which we enter an exception.

The COURT: I will hold that it is properly brought. I will hear——

57 Mr. CORNWELL: Will your Honor rule that you hold that the heirs may sue as the personal representative?

The COURT: It will only go to this extent, that because these persons are declared to be the exclusive heirs of this deceased, it would be a work of supererogation to appoint a personal representative of these two heirs.

ANN ELIZABETH BIRCH being recalled as a witness, testified as follows:

Mr. CORNWELL:

Q. Mrs. Birch, what property, if any, did your husband have aside from his salary as a brakeman?

A. Nothing else.

The COURT:

Q. No estate of any kind?

A. No.

Mr. CORNWELL:

Q. Have you ever had administration papers taken out in the district Court?

The COURT: You might as well admit that she has not.

Mr. SWEET: I admit that as far as I know no administrator has ever been appointed.

Q. Has any administrator ever been appointed on the estate of your deceased husband?

The COURT:

Q. Has any personal representative ever been appointed?

Mr. CORNWELL: I was going to put the three of them.

Q. Has any administrator or administratrix ever been appointed for the estate of your husband?

A. No, sir.

Q. Has any executor or executrix ever been appointed?

A. No, sir.

58 Q. Has any personal representative ever been appointed?

Mr. SWEET: That is a question of law.

The COURT: You may answer that, save as shown by the paper admitted this morning, that myself and my son are the exclusive heirs.

Mr. CORNWELL: She has not answered that.

The COURT: I did for her.

Mr. SWEET: She shook her head.

Mr. SWEET:

Q. Do you know what an executor is, Mrs. Birch?

A. No.

Witness retires.

ERNEST VICTOR BIRCH being recalled as a witness, testified as follows:

Mr. CORNWELL:

Q. You testified this morning that you were sick almost continuously while you resided in Porto Rico did you not?

A. Yes, sir.

Q. Under what physician; who was attending you?

A. I told you the Presbyterian Hospital; I consulted there.

Q. Now who was the doctor?

A. Dr. Atkins.

Q. All the time during all these six years?

A. I also consulted an American physician; I don't remember his name. He used to live in San Francisco Street. He is not in Porto Rico at the present time.

Q. How long were you under Dr. Atkins' care?

A. I just went and consulted her and the medicine didn't seem to do me much good and I didn't go back.

Q. How long were you under her care? Did you just make one visit there?

A. One visit.

Q. Now this doctor on San Francisco Street; did you make him one visit too?

A. No, I made him several visits.

Q. How long ago was that?

A. It is a good many years ago. It is about six years ago.

The COURT: You were under age then. Since about six years ago who have you consulted?

A. Nobody. Up in New York?

Q. No, here in Porto Rico.

A. Nobody.

Mr. CORNWELL:

Q. Up to the time of your father's death after you consulted Dr. Atkins, Mrs. Holmes it is now, what other physician did you consult?

A. Here in Porto Rico?

Q. Yes.

A. None.

Mr. CORNWELL: That is all.

Redirect examination by Mr. SWEET:

Q. Who did you consult in New York?

A. Several times I went over to the Lincoln Hospital and Home. It is a hospital in New York City and I went there and got free attendance.

Q. How often did you go there?

A. Every time I felt sick I went up there; every five or six weeks.

60 Q. And would you stay there during your sickness?

A. No, sir; I just went there for medicine and then went back.

Mr. SWEET: That is all.

Witness retires.

ANN ELIZABETH BIRCH being recalled as a witness, testified as follows:

Mr. CORNWELL:

Q. I believe you said this morning, Mrs. Birch, that your husband never lost any time as brakemen on that road, didn't you?

A. Yes.

Q. Do you remember in December, 1906, and January, 1907, whether he was working for the company?

A. Yes.

Q. Was he working?

A. Yes.

- Q. Where was he working?
 A. Now I remember he got his leg crushed.
 Q. No, I mean in December, 1906; December, 1906, and January, 1907, and part of February.
 A. Sick with fever.
 Q. He was not working for the company then was he?
 A. Yes.
 Q. He was working for the company?
 A. Yes.
 61 Q. Where was he? Where was he working; at what place?
 A. On the train.
 Q. While he was sick with fever?
 A. No, he was at home.
 Q. During that three months then he was not working?
 A. It was not three months.
 Q. Well, how long was it?
 A. It was about a month and a half.
 Q. As a matter of fact didn't he enter the Presbyterian Hospital on the 8th of December, 1906?
 A. Yes, with fever.
 Q. And wasn't he there all of January?
 A. No, no.
 Q. How long was he there?
 A. The last of December he came from the hospital.
 Q. Are you sure of that?
 A. Yes, quite sure of it.
 Q. Well, did he receive any pay for December and January?
 A. Yes, he received some money.
 Q. From the railroad?
 A. Yes.
 Q. I will refresh your recollection with a certificate from Dr. Stokes and see if he wasn't in the hospital all that time?
 A. The company never paid the doctor.
 Q. I know they did not pay it. Was he in the hospital during that time?
 A. No, in January he was not in the hospital.
 Q. Then that certificate of Dr. Stokes is not correct?
 62 A. He came home the last of December. That is not correct at all.
 Mr. CORNWELL: I offer a certificate issued by the Naval Hospital by Dr. Stokes certifying that Francisco Birch—
 The COURT: You haven't got to your side of the case to offer anything yet.
 Q. Then he was not sick during that time?
 A. During what time?
 Q. December and January; December, 1906, and January, 1907.
 A. Yes, in December he was sick in the hospital and he came out in the last of December from the Presbyterian Hospital.

The COURT:

Q. Now in January, 1907, was he working for the railroad; the following month did he work for the railroad?

A. The following month, in the last of the month he went back to work.

Q. He stayed at home then for a while after leaving the hospital?

A. Yes, he was so weak from it.

Mr. CORNWELL: That is all.

Redirect examination by Mr. SWEET:

Q. Are you sure he was in the Presbyterian Hospital?

A. Yes, and he came home the last of December.

Witness retires.

63 ANDRES RODRIGUEZ being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Interpreted.

Q. State your name.

A. Andres Rodriguez.

Q. Residence and age.

A. In Aguadilla; twenty-five years of age.

Q. How long have you lived in Aguadilla?

A. All my life since I was born.

Q. What is your occupation?

A. Baker.

Q. Were you acquainted, or did you know in his lifetime one Francisco Birch, a brakeman on the railroad?

A. I saw him pass several times but I didn't know his name.

Q. You knew him by sight did you?

A. Yes, sir.

Q. Do you know anything of an accident that occurred on the second day of April of this year in Aguadilla, by which this man Birch lost his life?

A. Yes, sir.

Q. State to the Court and the jury what you saw.

A. On the second day of April between two and three o'clock in the afternoon, I was standing near the track, on the edge of the track, and I saw the train coming at a high rate of speed and when it passed by me I heard some noise coming from the rear cars and this man was riding on the top of the car and he was applying the brakes with one hand and with the other hand he was signalling to the engineer in the engine. Everybody yelled; all those who

64 were in that vicinity. Five minutes after the train had left from where I was standing or near to the place where the cars were; where the two cars were, one on top of a house and the other one where this man was beneath it crushed by it; (The translation was corrected by the Interpreter at the suggestion of counsel, to read: Was leaning against a house instead of on top of a house). Two of the men who were on one of the cars jumped off; one fell on his feet and the other fell on the floor.

Q. These men who jumped from the train, jumped from the top of the cars or from the inside of the cars?

A. Inside of the car.

Q. Did you go up to where the car was off the track?

A. Yes, sir.

Q. What did you do there, if anything?

A. I helped to put up the car in order to take out the body of this man who was there.

Q. You say this train was running fast?

A. Yes, sir.

Mr. CORNWELL: I object to any question as to the speed. It is immaterial whether it was going fast or not. There is no law prohibiting its running fast.

The COURT: Find out whether the man was dead or not.

Mr. SWEET: The answer admits that.

The COURT: I don't know whether this question is very material under this act of Congress. I will hear you.

Mr. SWEET: There are two propositions. Our first proposition is that it is a matter of negligence anyhow for this train to
65 travel at the rate of speed which we propose to show it did travel through that town. Second; we propose to show such action as has been taken by the city council of Aguadilla and the Executive Council of Porto Rico to show that their speed was limited through that city and that they were far exceeding their limit. The vital point in these two propositions is this: We expect to show that it was about from five to six hundred yards from where the engineer was signalled to stop before the car went off the track, and that in such a distance, unless something was radically wrong, he could stop that train.

The COURT: The question arises under that act you have before you, under this language; That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Well now then, if that shall be held to be in force, why wouldn't a high rate of speed, coupled perhaps with the absence of appliances to stop, be a material factor in connection with the accident, even though it occurred by a latent defect?

Mr. CORNWELL: For the very reason that the declaration does not allege it.

66 Mr. SWEET: Does not allege what?

Mr. CORNWELL: The very proposition that your Honor states; granted that the train was going at a high rate of speed and that he signalled to the engineer and the engineer did not stop, that doesn't establish any act of negligence. The track may have been slippery. Even if there is an ordinance of the municipality of Aguadilla regulating the speed of the trains of the American Railroad, and we deny that there is any such ordinance, we were on our own right of way.

The COURT: Without reference to any ordinance, I will hold that he can show the rate of speed that the train was going, if he can. The rate of speed, if it was excessive, may have cut some figure with reference to other proofs in the case. The question may be asked.

Mr. CORNWELL: Note an exception.

Q. Now state to the Court and jury what you mean by that; why you say it was running fast; at what rate of speed?

The COURT: You must qualify him for that.

A. Because the train had been passing at that speed for some time back and after that time it did not pass with that speed.

The COURT: That will be stricken out.

Mr. SWEET: I didn't ask for that.

Mr. CORNWELL: I move to strike out all of his testimony on the ground that he testified that it was the speed at which they passed before, and therefore that it was running at an ordinary speed.

67 The COURT: You have got the benefit of that. It is there.

Mr. SWEET: If they have been violating all rules of safety and all rules of care for the community for a month, then I suppose they would be excused for it.

The COURT: The fact that they were violating any municipal ordinance, I don't see how it could cut much figure. I think I am right on that, Judge Sweet. Proceed as best you can. Unless the speed was the proximate cause of the injury. A proper instruction will be given on that.

Mr. SWEET: We don't claim that the speed was the only cause of the injury.

The COURT: That is the theory upon which I admit it.

Mr. CORNWELL: Note our exception.

Q. Can you give the jury any definite idea of how fast that train was traveling through Aguadilla that day?

A. The same as a train when it is crossing the country.

Q. What attracted your attention to the train that particular day?

A. I was close to the track taking care of a goat that I had there.

Q. But what attracted your attention to the unusual speed of the train?

Mr. CORNWELL: I think that is leading the witness.

The COURT: Yes, it is leading.

A. Because I live there and I see always the train when it passes. I live in that neighborhood.

Q. What difference was there between the speed of the train that day and its usual speed, if there was any?

68 The COURT: That is cross examining your own witness. You have that well in evidence.

Q. Did you hear the brakeman say anything?

Mr. CORNWELL: What brakeman.

Mr. SWEET: The brakeman Birch.

Mr. CORNWELL: On what theory are you going to ask that?

The COURT: I don't know.

A. I saw him signalling with his hand.

Q. Were there many people around there?

A. Yes, quite a number.

Q. What was said, if anything?

Mr. CORNWELL: What was said by who? It doesn't make any difference what people said.

Mr. SWEET: Well, but it does make a difference what people said.

The COURT: What do you mean, Judge Sweet?

Mr. SWEET: I mean that if a train goes tearing through a town and the people run out to see what occasions the disturbance, we have a right to show it.

The COURT: You have a right to ask it on cross examination. You might ask what they did.

Mr. CORNWELL: Note an exception to those questions.

A. They all yelled to him to stop, stop.

Q. Yelled to who?

A. To the engineer.

Q. How far did he run after you saw the brakeman signal him to stop before the car went off the track?

A. Ten or twelve meters; something like that.

Q. After you saw it?

A. After I saw it.

69 Mr. SWEET: Take the witness.

Cross-examination by Mr. CORNWELL:

Q. How far were you standing from the station?

A. I was about three meters distant from the track.

Q. How far were you from the station, the passenger station where passengers get off?

A. I was distant because the station is further up. I could not see it from where I was.

Q. I know it is on a turn but how far is it?

A. About twenty cuerdas, more or less.

Mr. CORNWELL: 225 feet is a cuerda.

Q. How long is a cuerda?

A. One hundred varas or yards.

The COURT:

Q. It would be more than a kilometer then; a kilometer and a half.

A. I haven't noticed or paid attention to the number of kilometers because further up from where I live there is a kilometer post there but I am not sure what it marks.

Q. You say that you were about twenty cuerdas from the station?

A. More or less, I am not sure.

Q. How far is it towards Mayaguez from where you were standing to the first switch or the switch which takes you down into the town?

A. More than three hundred meters.

Q. Now in meters how far was it from where you stood to the station?

A. I don't know because I very seldom pass through that place because they don't allow people to pass through that place.

The COURT: What is the fact?

70 Mr. CORNWELL: It is half a kilometer from the station to the switch. I guess counsel will admit that it happened between the station and the switch.

Q. That train stopped at the passenger station didn't it?

A. I didn't see it.

Q. What were you doing along the track there?

A. I was speaking with an employé of the company there.

Q. What employé?

A. Doroteo Alvarez.

Q. Did you have a goat along the track that you were feeding?

A. Yes, sir.

Q. Pasturing a goat on the right of way of the company?

A. No, sir.

Q. Now how far was it from where you saw that train to the tank where they take water?

A. I don't know the distance.

Q. Isn't the tank right there at the switch?

A. No, it is further down.

Q. How much further down?

A. I never had the curiosity to measure it.

Q. You know what train that was, don't you? It was the local freight, wasn't it?

A. Yes.

Q. The regular local freight train wasn't it?

A. Yes, sir.

Q. Doesn't that train every day stop there at the switch and back down into the playa of Aguadilla to take freight?

A. Yes, sir.

71 Q. And that switch was only about 300 yards from where you saw the train?

A. More or less.

Q. Yet you still now insist that the train was going at a high rate of speed?

A. Yes, sir.

Q. Well was it going faster than it did other days?

A. Yes, sir, faster; almost every day it passed that way.

Q. Then it was going at its usual speed?

A. As when the train is traveling through the country, because at that place the train should go more slowly.

Q. Now was it going faster than it was the days before when you had watched it?

A. Yes, sir; faster.

Q. Much faster?

A. Yes, sir; much faster.

Q. How fast was it going; can you tell, more or less?

A. I cannot say; I have travelled sometimes on trains but I cannot tell that.

Q. But you live right there alongside of the track don't you?

- A. Yes, sir; it is near.
- Q. Yet you don't think you can judge the speed of those trains?
- A. No, sir.
- Q. Now you said that Mr. Birch was signalling the engineer didn't you?
- A. Yes, sir.
- Q. What car was he on?
- A. He was on the next to the rear car.
- Q. He was on the roof of the car?
- 72 A. Yes, sir.
- Q. Was that one of the old cars or one of the new American cars?
- A. The American cars.
- Q. One of the new cars?
- A. Yes, sir.
- Q. And from the time he signalled until the train was brought to a stop, what distance was it; what distance did the train travel?
- A. About 300 yards or meters.
- Q. From the time he signalled as the train passed you until the train stopped, it was 300 meters or yards?
- A. Yes, sir.
- Q. Did you see him when he first began to signal the engineer?
- A. I saw him.
- Q. Did the engineer see him?
- A. I am not sure whether he saw him.
- Q. But from the time he made his first signal until the engine stopped it was about 300 yards?
- A. That is it.
- Q. And you could see him all the time?
- A. I saw him up to the time that the train entered a curve because there was a curve there.
- Q. How far was it from where you were standing to the curve?
- A. One hundred and odd meters, more or less.
- Q. And during that time was the train slowing down or was it still going fast?
- A. The same speed.
- Q. Then the engineer was not paying any attention to the signals of Mr. Birch?
- A. I didn't see that he paid any attention to them.
- 73 Q. Well could he see him? Could the engineer see him?
- A. Yes, he could see him.
- Q. On the top of that car there at the rear of that train?
- A. Yes, sir.
- Q. Still the engineer could see him could he?
- A. Yes, sir.
- Q. Wasn't there box cars between Birch and the engine?
- A. One on the rear.
- Q. None in front?
- A. Yes, sir; there were some.
- Q. Weren't there some cars loaded with cane?
- A. Yes, sir; loaded with cane.

- Q. Still you think the engineer could see him, do you?
A. Yes, sir; that is the highest car; It is very plain.
Q. Where was the engineer?
A. He was driving the engine with the regulator.
Q. That was an American engine wasn't it?
A. Yes, sir.
Q. Could you see the engineer from where you were?
A. Yes, I saw him also.
Q. What side of the track were you on; on the side towards the sea or the upper side?
A. On the upper side.
Q. And the engineer was on that same side of the train you were?
A. On the opposite side.
Q. Yet you could see him?
A. Yes, sir; I could see him.
Mr. CORNWELL: That is all.
Mr. SWEET: That is all.
Witness retires.

- 74 FERNANDO MARTINEZ being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Interpreted.

- Q. State your name, age and residence.
A. Fernando Martinez; in Aguadilla; thirty years of age.
Q. And your occupation?
A. I am a practitioner or minor surgeon.
Q. Were you acquainted with Francisco Birch, a brakeman on the railroad?
A. Yes, sir.
Q. Were you in Aguadilla on the second of April, 1909, and are you acquainted with the facts or any of them connected with his death?
A. Yes, sir.
Q. Will you commence and state in your own way to the Court and jury what you saw and know of the accident, of your own knowledge?
A. On the second of April of this year between half past three and four o'clock in the afternoon, the freight cars used to pass through the town of Aguadilla. At that time I was together with Corporal Soto of the insular police at a place called Santo Domingo where the train passes in front, and upon hearing the screams of the people in the neighborhood, yelling that the train had derailed or gotten off the track, we heard the noise of big boxes bumping together and then we looked behind, and as the train was coming along that day at a high speed which was not the ordinary speed; a higher speed than ordinarily, the only thing I could see was on the next car to the rear, to the last one, a brakeman who was applying the brakes with

75 his left hand and with his right hand he was signalling the engineer to stop, and immediately we saw that the right part of the base of the right hand rail was broken. The broken wheel was like a plow following the rail, making a groove on it, and then I continued running to see where the train was going to stop, but upon arriving at the curve I saw two cars tipped over, or that had capsized. And under the large car where this unfortunate man was riding, the car was crushing this man. He had fallen under the car and had been killed. And after they took him out, the other car had smashed a house which was on that side. I remained there until the judge and the priest came and certified that he had been killed. Some neighbors there took out a cot and placed the body on it.

Q. Did you help take the man out from under the car?

A. No, sir; but I saw him when he was taken out.

Q. Was he alive when he was taken out?

A. No, sir; if he was alive, life was little in him so that he did not speak at all; he did not exhibit any life.

Q. How far were you when you first saw this train from where it was derailed?

A. 50 meters or 150 or 160, something like that; you cannot tell that exactly.

Q. How far did this train run after you saw the brakeman putting on the brake and signalling the engineer, as you say, before that car left the track?

A. A considerable distance; we don't know the point where the wheel broke off, but as soon as the people began to scream, we saw that the car already was bumping or jumping and in that distance it might have been 350 meters, a long stretch.

Q. And it went along in that bumping condition for 350 meters?

76 A. Yes, the car went along breaking all the base of the track; the stones were all crushed to dust.

Q. Did you hear Birch say anything?

A. While he was on top of the car?

Q. Yes.

A. As the train passed by at such high speed and as he was from Saint Thomas, the only thing I heard was: Stop, stop.

Q. Do you mean that that was all you heard or all you could understand?

A. It is all I could understand because the train passed there rapidly. Owing to the fact of the speed of the train and his language, the most salient expressions which he uttered was that: Stop, stop.

Q. You spoke of hearing cries there. Who was present besides yourself and the corporal?

A. The people in the neighborhood; lots of people around. At that time we just paid attention to find out, or confined our attention to find out what was going on.

Q. Were they all crying or calling?

A. Yes, all the neighborhood; they were all crying.

Q. What were they saying?

A. That the train was coming off the track; that it had been derailed; those natural exclamations which occur in those instances and we together with the corporal of the police, we also made our signals to the engineer calling his attention but he continued on.

Q. Do you know whether the engineer saw you or not?

A. I cannot say whether his eyes met with our eyes. As it passed so rapidly, we could not determine whether he saw us or not; both of us made signs at him to stop but he continued.

77 Q. Didn't you make a little sketch of the track and ground there?

A. Yes, sir; I made a plan and I brought it.

Q. Have you got that with you?

A. The plan of the wheel or the track?

Q. Of the track.

A. I left it at the house of Mr. Wilcox.

Q. Can't you make a little sketch of it in a moment?

A. Not very well because that requires some time and some patience but I might give you some idea.

The COURT: He has told you the distances. What more do you want?

Mr. SWEET: We will see how long it will take. If it will take too long, we will dispense with it.

Mr. CORNWELL: We would like to have the plan which he made if counsel will send for it.

Mr. SWEET: The plan which we had ought not to take him over a minute to make.

Mr. CORNWELL: We have got those measurements too.

Mr. SWEET: Well we have not. This was not made from measurements.

The witness produces a sketch which he has drawn.

The COURT: Now explain your sketch to the jury.

A. A is the Aguadilla station at the bridge and B is the station at Aguadilla playa. The freight train ran here from A in the direction of the arrow. C is a little bridge. At the point D is where we found the wheel. E is a place where there is a sign announcing danger, which says that it is forbidden to pass that place and that the trains must slow down speed. The curve is at F. The

78 switch is right at F. The big arrow indicates the direction of Mayaguez. G is the house that was destroyed just beyond F on the main line. X is where the brakeman fell and was found dead. This is the house (indicating) where they took out a cot and placed the body of the dead man.

The COURT:

Q. Where were you when you first saw this?

A. At D where the wheel broke.

Q. You were standing there?

A. We were walking down here (indicating).

Q. The point D is where you were at when you saw the wheel break?

A. Yes, and when the piece fell off.

Q. And the point G is where the car tipped over and the man was killed?

A. Yes, sir.

Q. Now what is the distance between those two places?

A. About 150 or 160 meters.

Q. Where did you find the piece of the broken wheel?

A. Right at D.

Mr. SWEET:

Q. Where did you first see Birch?

A. When he was coming along there (indicating).

The COURT: Did you see him before the wheel broke off?

A. I didn't know when the wheel had broken off.

Q. Where was the train coming down this track when you first saw Birch?

A. About here; further here than D. The noise called our attention to it and we turned around to see what it was.

79 The COURT: Clip that off and offer it as illustrative of his testimony. That is offered as illustrating his testimony; for no other purpose.

Mr. CORNWELL: It is objected to on the ground that it is incorrect.

The COURT: Such things are never admitted save to illustrate the testimony of the witness.

Mr. CORNWELL: On the ground that it is incorrect and improper as evidence.

The COURT: That has been repeatedly ruled on.

Mr. CORNWELL: I know it has and it is not proper to be admitted before the jury.

The COURT: Overruled.

Mr. CORNWELL: Note an exception.

The rough sketch made by the witness was then placed in evidence and marked: Exhibit B for the plaintiffs.

Mr. SWEET:

Q. What is the nature of this track along here?

— — —

The COURT:

Q. What sort of country is it, or is it a street?

A. Through that barrio called Santo Domingo.

Mr. SWEET:

Q. Well is it a city street of Aguadilla?

A. Where the accident happened?

Q. No, sir; where you saw the train.

A. It is not a street and it is not country there.

Q. Are there many houses there?

A. At the point from which we saw the train coming, there are not many houses but that is a dangerous point. At that point where there is a sign calling to a train to slow down or reduce speed, that is the town.

Q. There are not many houses along the track there then?

A. I want to know what point you are talking about.

The COURT:

80 Q. Where you first saw the train, are there many houses there? A. Yes, there are many houses there of people living in that vicinity, and it is for that reason that we heard the screams of the people crying that the train had derailed.

Mr. SWEET:

Q. How far are those houses from the track?

A. Very near; we almost had a narrow escape from that train; we had to rush out.

Q. I asked you how far; to make an estimate of the distance these houses are from the track.

Mr. CORNWELL: I don't know the materiality of it.

The COURT: I don't see the materiality; what for?

Mr. SWEET: For the purpose of showing that it is a very dangerous place to run a train.

Mr. CORNWELL: If the train is on its right of way what difference does it make?

Mr. SWEET: It makes a great deal of difference. We are trying to get at how densely populated it was.

Mr. CORNWELL: What difference can it make whether there were houses along there or not. We were running along our own right of way and it is not on a street.

The COURT: I don't know whether it will be material whether it was violating any ordinance of the city or not.

Mr. SWEET: Take the witness.

Cross-examination by Mr. CORNWELL:

Q. Where had you been that afternoon when you came along there? Where were you coming from?

A. From my house.

Q. Now where do you live?

81 A. I live in a street which I cannot specify the name here. It is not like in San Juan where the streets have names. I live in an alley in that town.

The COURT:

Q. Was it up in the direction you were coming from that day?

A. Yes, sir; walking down in the same direction of the track.

Mr. CORNWELL:

Q. Towards the town?

A. Yes, sir; to the town along the same route of the train.

Q. Now do you live up near the station?

A. No, sir.

Q. Then you were going down town and you didn't live near the station; how is it that you were near that railroad?

A. Because I always take that route trying to evade the grades, and also because I had to see a neighbor, a man who was sick.

Q. Then you were not going down town. You were going to see a sick man.

A. Yes, sir; I was going to see a sick man, and Corporal Soto was making an inspection too.

Q. Where does that sick man live with reference to the railroad track?

A. It is on the other road; the only thing is that this is a shorter way.

Q. Now from the point where you saw the train, how far is that from the station, the passenger station, where you first saw it?

A. Some time it had left the station; it is a great distance. There is a long incline there.

Q. You know that that train always stops at the station don't you?

A. The freight train; no, sir.

82 Q. It doesn't always stop at the station?

A. At the station of the bridge; no, sir; at the playa station.

Q. Now how far from that station was it when you first saw it? Tell us in kilometers, when you first saw it; I mean in meters.

A. It is very difficult to determine that distance because I didn't take a meter to measure the distance, but I might say that there were about 400 meters.

Q. Didn't you draw a plan and measure that place?

A. No, sir; I did not calculate the meters because I was not asked to measure it in meters. It was only done by sight.

Q. What do you calculate it in? What measure did you use if you didn't measure it in meters; did you do it in yards or feet?

A. I was counting the rails.

Q. How many rails was it from the station to where you saw Birch on that train that afternoon.

A. From the station to the little bridge I counted six rails.

Q. From the station to the little bridge, six rails; the rails are thirty feet aren't they?

A. According to information obtained, all those rails have not the same length; some are ten meters long, others nine and some centimeters.

Q. There is about six inches difference in the rails isn't there; more or less, there is about six inches difference?

A. I cannot answer; I don't know anything about inches.

Q. Well, one rail is ten meters long.

A. According to the information received, some are ten meters and some nine meters and some centimeters.

Q. From the station to where you first saw Birch on that train signalling the engineer was six rails?

83 A. No, sir; from the station to the little bridge.

Q. I don't care anything about the bridge; I haven't asked you about that.

The COURT: That is what he said; to the little bridge. Now ask him what you want.

Q. I want to know how many rails it was from the station to where you first saw Mr. Birch on that train signalling the engineer.

A. Fifty-eight varas.

The COURT:

Q. That is from the station to where he was?

A. From the little bridge to the point where we found the wheel.

Mr. CORNWELL: That is not what I have asked him. I want to know the distance from the station to the point where you first saw Birch signalling the engineer.

The COURT: If you know.

A. I cannot tell that because I just turned my head and I saw the train pass rapidly and that was all of a sudden.

Mr. CORNWELL:

Q. Don't you know the point where you first saw it?

A. No, sir; I saw him forward riding on the car.

Q. About how far were you from the track?

A. The train passes at a place where those benches are and we were standing here about this distance. (The Court estimates the distance for the record at 25 feet.)

Q. On what street?

A. In that barrio called Santo Domingo. It is the outskirts of the town. It is not a street.

Q. Weren't you on that general road that leads from the station down to the town; the general road that everybody takes?

A. No, sir; it was not that road where the train passed.

84 Q. I know but isn't that where you were?

A. No, sir.

Q. What road were you using then in coming from your house?

A. There is a parallel street goes in front of my house; the embankment is too high.

Q. You could not see it from there?

A. No, sir; because if I was on the point where I picked up the wheel, I could not be at the same time in the other place.

Q. As a matter of fact how high is the terraplen above the road where you were standing?

A. It is level; it is on an incline.

Q. The roadbed is not raised above that street?

The COURT: You are assuming that it was a street.

Mr. CORNWELL: It was the right of way.

A. Along the road is entirely level; that grade is a grade.

Q. How much higher is the roadbed of the railroad than the road where you were standing?

A. It differs.

Q. No, at the point where you were.

A. The point where we were it is a little bit higher because it is on a grade.

Q. Higher than the roadbed of the railroad?

A. No, sir.

The COURT:

Q. Which was higher than the other?

A. The track is higher.

Q. Now how much higher than the road is it?

A. While you walk forward the grade is higher.

Mr. CORNWELL:

Q. Now at the point where you were which is higher?

A. We were higher than the roadbed.

85 Q. Then you were on the east of the railroad track looking towards Mayaguez?

A. Yes, sir; we were walking down.

Q. The engineer was on that side of the train was he not?

A. Yes, sir; if I was coming on the right, the engineer always rides on the right hand side in the same direction.

Q. Then you could not see the engineer from where you were standing?

A. Corporal Soto and myself signalled him.

Q. I didn't ask you if you saw the brakemen. I asked you as to the engineer.

A. He passed in front of me while——

Q. Doesn't the engineer sit on the opposite side of the cab from the side you were on?

A. No, sir; the engineer always sits on the right hand side going in any direction.

Q. Now that engine was going towards Mayaguez wasn't it?

A. Yes, sir.

Q. Now what side of the track were you on; the eastern or western side of the track.

A. I could not state by the cardinal points. You ask me by the right or left hand side and I will explain.

Q. Were you on the left or right hand side of the road in the direction in which the train was going?

A. The train was going that way and we were going that way too, (indicating).

Q. Then you were on the right hand side of the track?

A. Yes, sir; facing the same direction which the train had.

Q. Then you were not higher than the track; you were lower, you were on the down side of the track.

86 A. Yes, parallel to the road.

Q. But you just testified here that you were higher than the right of way.

A. There is a small hill there; you always find some depressions.

Q. Do you mean to say that there is a location in Aguadilla towards the sea higher than that railroad?

A. The track which leads to the playa is entirely of the same level as the road.

The COURT: I don't want to stop your cross examining him but I don't think you are getting out anything.

Q. What is the distance in altitude of the road where you were to the right of way of the railroad?

The COURT: I will take the witness in hand.

The COURT:

Q. When you were walking down along the right hand side of that railroad, were you walking on a path or a road or what?

A. There is just an open field there with the irregularities of the ground.

Q. Now was the place where you were standing in that open country or along the track, was it higher than the right of way of the railroad?

A. A little bit higher.

Q. You mean you were higher than the rails or the rails were higher than you?

A. Yes, sir; I was higher.

Mr. CORNWELL:

Q. You said that from the point where you found that piece of wheel to where the waggon went off the track was about 150 meters didn't you?

A. Not where the train got off the track but where the cars 87 capsized or tipped over.

Q. Nothing but the two cars got off the track; the rest of the train stayed on the track didn't it?

A. No, sir; the last car didn't get off the track; it capsized because the other car which was bigger carried it along.

Q. What became of the rest of the train?

A. There was nothing behind.

Q. The rest of the train; there were more than two cars; the cars that were in front of those two cars.

A. No, sir; excepting those two cars, the balance of the train was all right; they remained on the track.

The COURT:

Q. Well, did it stop or go on?

A. No, sir; because the couplings broke away there.

Q. But did the part that stayed on the track move on a piece or did it stop right there?

A. When we arrived there we saw the people lifting up the car to take out the man.

Mr. CORNWELL:

Q. As a matter of fact, didn't that train stop and wasn't it at a full stop within ten meters from where these cars tipped over?

A. I didn't pay attention to that. I confined my attention to seeing the dead man.

Q. But didn't you see the train standing right there?

The COURT: When you went down to pick up the body.

A. Yes, the train was standing still.

Mr. CORNWELL:

Q. Standing right there near where the cars tipped over, wasn't it?

A. The balance of the train was somewhat distant.

Q. About ten meters wasn't it; ten or twelve meters?

88

A. I cannot state that exactly. I know that Corporal

Soto ordered the engineer to take the train to the water tank.
Q. Well now what was the speed of the train when you saw those two cars turn over off the track?

A. At a speed that the train should not run.

The COURT: Never mind giving your idea of what it ought to do. Answer the question. Tell that witness to answer the question and stop when he has answered.

Mr. CORNWELL:

Q. Now at the time that the two cars turned over, what was the speed of the train?

A. It was not running at the normal rate of speed according to the regulations.

Q. Well, was it running faster or slower?

A. It was running without brakes or anything.

Q. Well, was it running fast or slow?

A. Fast; if it had gone slowly nothing would have happened.

Q. And that was at the moment the cars turned over?

A. Upon entering the curve; upon finding the radius of the curve; the sharpness of the curve.

The COURT: Now, Mr. Witness, what he is trying to find out is, what speed that car was going at the time those two cars tipped over. Those two cars of course stopped, but the rest of the train, how fast was it going; was it nearly stopped or was it going fast?

A. As when a train goes through the country.

Q. I am not asking you for a parallel. I am asking you for a fact.

A. I want to explain something.

Q. We don't want you to explain anything. Answer the questions. When those cars tipped over were they dragged along for some distance or did they stop right there?

89 Mr. CORNWELL: That is not the question. Note my objection to the question.

The COURT: That is what I want and I am going to get it without being interrupted.

Mr. CORNWELL: Note an exception.

A. At that exact time we had not yet got there.

Mr. CORNWELL:

Q. From the point where the two cars tipped over how far is it to the first switch?

The COURT: Now answer that question without any frills.

A. Right upon the switch.

Q. Does he mean that the man was killed right at the switch?

A. Close to the switch.

Mr. SWEET: That is the fact.

Mr. CORNWELL: That is right.

Mr. CORNWELL:

Q. Then the train was right at the point where it must back into the play when the accident happened?

A. Yes, sir; that is it.

Mr. CORNWELL: That is all.

Mr. SWEET: That is all.

Witness retires.

90 José A. Soto being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Interpreted.

Q. State your name, residence and occupation.

A. José A. Soto; I live in San Juan; I am corporal of the insular police.

Q. Where are you stationed now, corporal?

A. In San Juan.

Q. Where were you on the second of April of this year?

A. In Aguadilla.

Q. Are you acquainted with Francisco A. Birch, the brakeman who was killed there that day?

A. Before the accident I had known him.

Q. Were you on duty there that day?

A. Yes, sir.

Q. State to the Court and jury what you know of the accident, of your own knowledge; what you saw.

A. I was on duty that day, dressed like a civilian. I was near the barrio of Santo Domingo, a place called Santo Domingo, when I heard lots of people screaming. I was in the company of Mr. Martinez and we noticed that a man that was riding on top of one of the cars was making effort with one of his hands and with the other hand he was shaking it and yelling; Stop, stop.

Q. Making effort; what do you mean by that; setting the brake?

A. I cannot say, but it seemed so. I know that he was riding on the top of the train. I don't know what he meant by stop, but I saw that he was waving his hand.

Q. Well, go on.

91 A. Upon seeing that two of the rear cars were swinging very much, wobbling, I understood that it was off the track; was coming along off the rails. I only had time to signal to the engineer to stop, who saw me, but as the train was running so rapidly of course perhaps he didn't attend my signal for reasons which I don't understand. I don't know anything about mechanics.

Q. Then what?

A. Afterwards I continued in the same direction so as to find out what was going to become of that and in order to ascertain the facts. I noticed that the wheel of the train, of the car, left some marks. Shortly afterwards when we arrived at the place where the cars had capsized, we found that this man Birch was under one of the cars dead. Then I ran out immediately and called by telephone the captain and the judge. After they came, then I proceeded to arrest the engineer until further orders.

Q. About how far is this place called Santo Domingo where you stood, from the scene of the accident?

A. 150 meters, more or less; I cannot be sure of distance; I cannot explain well.

Q. How far was it from where you first saw this train, as nearly as you can state it, to the place of the accident?

A. In my opinion, I think there must be more than 300 meters.

Q. Where did this accident occur with relation to the switch?

The Court:

Q. Right at it or some distance away from it?

A. Right at the switch but at the point where the switch lever is.

Q. In what condition did it leave the switch?

A. The rear car or the end car, which was a small car, was left leaning against a house there and part of which was destroyed by the car, injuring one of the people who were inside of the house. Now the car where Birch was riding, that tipped over in an empty place there.

Q. He didn't quite understand the question I asked a moment ago, and that was the condition in which the switch itself was left after the wreck.

A. Entirely smashed or destroyed and the big car fell on top of the switch lever, upon the switch lever.

Q. Can you state to the Court and jury, corporal, the number of cars in this train?

A. I think there were seven.

Q. Including the two hind cars?

A. Yes, sir; including the two hind cars.

Q. What were the cars next to the engine or tender; flat cars or what kind?

A. I think there were two platform cars, big cars with cane, and one small car, two small box cars loaded up, the large car which killed Birch and the other small car which fell against the house, the load of which car was taken out by order of the man in charge there.

Q. Now did you go back to the place where the broken wheel was found, the piece of the broken wheel?

A. The captain; I didn't go.

Q. Did you see the broken wheel after that?

A. Yes, sir.

Q. Where?

A. When the judge ordered me to go and find or get an expert to examine the wheel.

Q. Where did you take the wheel?

A. It was left on the ground and there was a blacksmith very near in that neighborhood.

Q. Did you examine it with the blacksmith?

A. Yes, sir; he examined it there.

Q. What was the name of the blacksmith?

A. Lasalle; I don't remember his first name.

Q. Where is he now?

A. He is in Aguadilla.

Q. Do you know what his condition is, that is, whether he is sick or well?

Mr. CORNWELL: I think that is immaterial.

The COURT: He may ask it to show why he is not here.

Mr. CORNWELL: The wheel is here.

Mr. SWEET: It may not be the wheel.

A. I know that he is sick.

Q. State to the Court and the jury the result of your examination of this wheel.

Mr. CORNWELL: I object to that. He is not qualified as an expert.

The COURT: It doesn't require an expert to say: I saw a wheel and it was broken in such a way and so much of the brake was new and so much of it was rusty.

Mr. SWEET: We are not going to ask him any expert questions.

The COURT: The objection is overruled.

Mr. CORNWELL: Note an exception.

A. It was broken in three pieces.

Q. Where was it broken?

A. On the upper side where it runs over the rail.

94 Mr. CORNWELL: Isn't the best evidence the wheel itself?

The COURT: I assume it is but I cannot make them bring it here.

Mr. CORNWELL: They can't testify what its condition is when the wheel is here.

The COURT: You can contradict it with the wheel if you have it. If you tender them the wheel, bring it in yourself.

Mr. SWEET: We don't want their wheel. In the first place, we don't know whether they have got the wheel here or not. They can bring some wheel in here and may be it is the wheel that was there that day and may be it is not.

Mr. CORNWELL: I object to any testimony as to the condition of that wheel. The best evidence to show the actual condition of the wheel is the wheel itself. There is no testimony to show that it is outside of the process of this court if plaintiff wants to reach it.

The COURT: The Court won't rule with you on that. If it was a document or paper, the statute permits it, but I won't hold that they have got to issue any subpoena duces tecum unless they do it voluntarily.

Mr. CORNWELL: Note an exception.

Q. Tell what, if anything, further you saw on this wheel or in connection with it?

A. I saw that the wheel was broken in three pieces. I noticed that a part of one of the fragments where it had broken, it was rusty about two inches.

The COURT: You will connect this up, will you, Judge Sweet?

Mr. SWEET: I don't know what your Honor means.

The COURT: Unless you will show that this was the wheel that came from under that particular car. He didn't find the wheel where it was broken. I assume that you are going to connect this.

Q. How deep?

A. (The witness indicates about one-third of an inch on his finger). That was the rusty portion which could be observed.

Q. How was the break with relation to that rusty streak?

—, —.

The COURT:

Q. Was the break in that rusty part or somewhere else?

A. It was not on the part of the break. It was further down from where the brake applies, on the inner side.

Mr. SWEET: I wish you would take a pencil and make a sketch of the wheel as you saw it.

A. (The witness draws a rough sketch.) That is the rim of the wheel where it has the friction with the rail and a section of the wheel was broken out in two forms as I have illustrated there, but in the middle of one of the places where it broke was the old crack.

Q. Now indicate on this mark here where the crack was.

A. The crack was where the cross is marked; on the inner side.

Mr. CORNWELL: For the sake of the record, I move to strike out all the testimony as to the diagram and the injury of the wheel on the ground that it is incorrect and is not a correct representation of the wheel and there has been no connection to show that it was the wheel that was under the car.

The COURT: Overruled as to the first ground because the witness says that it is correct.

Mr. CORNWELL: Note an exception.

Q. How do you know this was the wheel?

A. Because they had just brought it there and it was right close by and it was still attached to the car, and afterwards the gentleman took it away to the switch.

Q. The main portion of the wheel was still attached to the car was it?

A. Yes, sir; of course.

Q. And what you went back to pick up; what was that?

A. The pieces; I didn't pick them up.

Mr. SWEET: I think that connects it sufficiently.

The COURT: Yes.

Q. Now, corporal, what have you to say as to the speed of the train that day, and first state to the Court and jury what opportunities you have had to judge of the speed of trains or moving vehicles of any kind.

A. I had many opportunities because I have been in the police force for a long time and have ridden a good deal. It was running at a higher speed than what a train runs in a straight road or path within the urban zone.

Q. Give to the Court and jury an estimate of the number of kilometers per hour you believe that train was running.

Mr. CORNWELL: I object on the ground that he has not qualified as an expert.

The COURT: If you know.

Mr. CORNWELL: Note an exception.

A. I think that that train was running at more than thirty kilometers per hour as it went.

Q. Now upon what do you base your judgment?

A. I base my calculation that if an automobile may run about twenty-five kilometers an hour, an automobile would not
97 run that fast. I am referring to the regulations out of the urban zone. This is only an approximate idea.

Q. How long have you been engaged on the force corporal?

A. Ten years.

Q. What is your duty with relation to automobiles travelling through the country?

Mr. CORNWELL: I object to that. That is immaterial.

Mr. SWEET: It is quite material as to showing his capacity.

The COURT: You objected on the ground that he did not qualify him. He is doing it now after the fact rather than before.

A. To watch that they don't run at a higher speed than sixteen kilometers within the urban zone.

Q. And outside?

A. And outside twenty-five miles, not kilometers.

Q. Now how much experience have you had in observing these automobiles?

A. To be in constant observation of those vehicles.

Q. How long had you been on the force, did you say?

The COURT: He said ten years.

Q. How long had you been in Aguadilla on the second of April of this year?

A. Since August of the previous year.

Q. What have you to say of the speed of the train on that day as compared with its ordinary speed through Aguadilla over this same track?

A. I have always had opportunities to watch the train coming down with a velocity or speed not as it was running that day; a lower speed but still dangerous owing to the topographical position
98 of the town of Aguadilla with reference to the alignment of the track; on more than one occasion.

The COURT: Never mind telling that.

Mr. SWEET: Do you think, your Honor, it would be improper for him to state what had happened repeatedly?

The COURT: Yes, we are trying what happened this day.

Mr. SWEET: Did your Honor rule out the right to show how far these houses are from the track?

The COURT: Wholly immaterial; the speed of the train is what we want here. I don't care whether it was built up as a solid block on each side or whether it was open country.

Q. What became of the rest of the train after these two cars left the track?

Mr. CORNWELL: I understood he testified that he was not there at the time of the accident but that he came up later.

The COURT: I don't know what he will answer.

A. It went along a distance of twenty-five meters.

Q. How were these cars that passed on; uncoupled?

A. Yes, sir; they went some distance; they had been detached.

Q. How; what detached them?

A. Well they were uncoupled from the couplings where they were attached with the car that caused the injury or death of Birch.

Q. You don't know the detail of how that disconnection was made, do you?

A. No, sir; that is only a guessing; owing to the capsizing of the two cars.

99 Mr. CORNWELL: I object to his giving his opinion.

Mr. SWEET: There is no question about the car being uncoupled.

Q. What is the nature of the grade where the main train with the engine stopped; was it level, up grade or down grade?

A. Up grade.

Q. This car upon which Birch was riding and braking you say capsized?

A. Yes, sir; it capsized. It fell on a house there, near a house.

Q. Did it take the trucks with it?

A. No, sir; the trucks were afterwards carried by a peon of the company; when I went with the engineer under arrest, we had to wait for the removal of those trucks to another switch at a place called Campilla where the water tank is, so we could pass along again to the place of the accident.

Q. Did you observe how the superstructure of that car was fastened to the bed on which it rested on the trucks?

A. Yes, sir.

Q. State to the Court and jury how it was fastened.

Mr. CORNWELL: Just a moment; there is no question raised about that in the pleadings.

The COURT: I don't know what the object of this is. What is the object?

Mr. SWEET: To show their negligence in the construction of that car.

Mr. CORNWELL: That is the very part that Your Honor ruled out of their amended declaration and struck it from the files.

100 Mr. SWEET: Under this act and under this allegation in the complaint, they are charged with having a perfect train for whatever that train purports to be.

The COURT: Do you expect to show that it was not a regularly made American car that is brought down here for such purposes?

Mr. SWEET: That is what I expect to show. I expect to show that the biggest part of this car practically rested on the bed of the trucks without being fastened there in any way at all.

The COURT: You can show that I suppose.

Mr. CORNWELL: There is nothing of that kind in the pleadings. If it was in the pleadings why haven't we the car; at least we should have the opportunity to bring it. They haven't alleged any defect about the car. They allege a defect in the wheel.

The COURT: Struck out about the car.

Mr. SWEET: Take the witness.

Cross-examination by Mr. CORNWELL:

Q. What is the ordinary speed of trains leaving the station of Aguadilla going towards Mayaguez coming down that hill?

Q. They go very slowly owing to the danger around. I am referring, and this is done by the mail train or passenger train and not the freight train.

Q. You mean the mail train or passenger goes very slowly down the hill?

A. Yes, sir.

Q. And what is the ordinary speed of freight trains going down that hill?

101 A. Faster than the other trains.

Q. Well how many kilometers per hour; what is the ordinary speed every day of the freight trains?

The COURT: You said it was going very much faster that day, but how does it go ordinarily? If it ran thirty kilometers that day, how many does it run other days, before that?

A. At about twenty-eight kilometers.

Mr. CORNWELL:

Q. You can tell the difference between a train going twenty-eight kilometers an hour and one going thirty?

A. I might calculate that owing to the speed with which it runs.

Q. As a matter of fact then the day of the accident the train was running at about its ordinary speed, wasn't it?

A. It was going much faster than ordinary.

Q. Now you have seen that train outside of Aguadilla, between Isabela and Aguadilla, haven't you?

A. Yes, sir.

Q. At what speed does it run then?

A. Faster.

The COURT:

Q. Well as compared to that place, does it run faster or slower than it runs at that place of the accident, or ran that day?

A. The same as when it is traveling through the fields.

Mr. CORNWELL:

Q. Now do you remember the schedule of that train; what time it makes between Isabela and Aguadilla?

A. I don't remember.

Q. Well it is running at that speed is it?

A. According to the location where it runs.

Q. Well I am giving you the last station; now the last station before you get to Aguadilla is Isabela isn't it?

The COURT: Introduce your schedule. You have got his testimony on that.

Mr. CORNWELL: Do you rule that out?

The COURT: Yes, ask it properly.

Mr. CORNWELL: Note an exception.

Q. You have noticed that train lots of times as it made the trip from Isabela to Aguadilla, haven't you?

A. Sometimes.

Q. Well now what was the speed of that train when you noticed?

The COURT:

Q. At those times when you noticed it in the country between Aguadilla and Isabela.

A. The train runs at different speeds according to the location; on some occasions it runs at a higher speed and at some, less.

Mr. CORNWELL:

Q. After it leaves Isabela on that level plain at what speed does it run?

A. Upon leaving Isabela necessarily it goes slowly but after it gets out it increases the speed.

Q. Now what is its speed when it acquires its speed?

A. A rapid speed.

Q. How many kilometers an hour?

A. Twenty-five kilometers.

Q. That is as fast as it runs?

A. On certain points that is the highest speed developed and at other points it develops a higher speed.

Q. Higher than twenty-five kilometers?

A. No, sir.

Q. Its maximum speed then is twenty-five kilometers an hour?

A. That is what I calculate.

103 Q. And then what do you calculate its speed when it is going down hill; when it starts to go down the long hill into Aguadilla?

A. That is at the will of the engineer.

Q. What is its general speed? You say you notice it there all the time.

A. 28, 26, 27 kilometers; that is the ordinary speed for freight trains.

Q. How far had that train passed the passenger station in Aguadilla that day when you first saw it?

A. A very short distance.

Q. Well how much?

The COURT: In yards.

A. More than 200 meters.

Mr. CORNWELL:

Q. It had passed the station about 200 meters?

A. Yes, sir; more or less.

Q. Now what is the distance from where you first saw the train at this 200 meters to the point where the cars went off the track?

A. 200 and odd meters.

Q. Well, how much; 225, 250; how many?

A. 250 or thereabouts, more or less; I have not measured them.

Q. And those cars were thrown off the track at the switch, weren't they?

A. I saw the cars when I arrived there, not at the moment, but they were right at the switch.

Q. And that was about 250 meters from the point where you first saw them?

Mr. CORNWELL: (Before the answer of the witness is translated by the Interpreter.) That is not an answer to my question.

104 The COURT: Your question is simply deductive. There is no need of asking him that. The jury can calculate it.

Q. You said that you first saw the train 250 meters from the passenger station.

A. But you could not see the station from where I was.

Q. I understand, but the distance is 250 meters.

A. 200 meters, more or less.

Q. Now from that point to where the cars went off the track was 250 meters.

A. Yes, or 300 meters.

Q. Now, when you first saw the car was it bumping as though the wheel was broken?

A. Yes, sir; they were bumping.

Q. In other words, 200 meters from the passenger station the wheel was already broken.

A. Or more; that is the point from which I saw the car.

Q. Well how much more than 200 meters?

A. I cannot state that; I cannot tell.

Q. Now when you first saw this Mr. Birch what was he doing?

A. He was on top of the car, riding on top of the car with his hand placed on the wheel of the brake and yelling: Stop, stop.

Q. He was on top of the car?

A. Yes, sir.

Q. And how far were you from him then?

A. I saw him coming.

Q. Yes, but how far were you from him?

A. One hundred meters, more or less. It is a long time;

105 I cannot state exactly.

Q. On your direct examination didn't you testify that it was 150 meters?

A. That is from the point where I was standing to the point where the cars derailed.

Q. Well when you heard him yelling stop, how far were you from him?

A. Very near.

Q. Well, how far?

A. I don't remember the distance.

Q. Didn't you just testify a hundred meters?

A. That is when the train was approaching already.

Q. Well isn't that when he was making the signals?

A. Yes, sir; but when he hallowed: Stop, stop, it was further down from the point where I had first seen the train and I signalled the engineer.

Q. How far was that?

A. Very near; as from here to those benches there (The Court estimates the distance for the record at twenty feet), as it was going so rapidly.

Q. On what side of the railroad track were you; towards the sea or the mountain?

A. Towards the sea.

Q. Could the engineer see Birch?

A. Undoubtedly because he was riding on top of the car.

Q. Weren't there some other box cars between him and the engine?

A. They were not so high as the car he was riding on.

Q. Weren't there two cars loaded with cane?

106 A. Yes, sir; they were not very much loaded up; it appears that it was some remnant of cane.

Q. Did you see the engineer when he passed?

A. Yes, sir.

Q. What was he doing?

A. In the engine.

Q. Was he looking at some machinery or was he looking forward or backwards?

A. He saw us but as he passed so rapidly we could not see what he was doing.

Q. Was he looking towards Birch or was he looking towards the front of the train?

A. He was facing the track looking forward.

Q. Then he could not see Mr. Birch?

A. I afterwards saw him signal him; he was looking towards the front and towards us.

Q. He could not see Mr. Birch?

A. If he had wanted to, yes.

Q. But did he see him?

The COURT: I won't permit any more of that. Stop that and proceed with something else. Take your point on it.

Mr. CORNWELL: I will note an exception.

Q. How far did these wagons turn over from the switch that leads down to the playa?

A. Right at the switch.

Q. Doesn't that very train, that train in question, always back into the playa every day?

A. Yes, sir.

107 Q. And it stops there and backs in on that switch every day doesn't it?

A. During the time I have been in Aguadilla I have observed that the train does that.

Mr. CORNWELL: That is all.

Mr. SWEET: There is one question I want to ask, that I had forgotten on direct examination.

The COURT: What was it?

Mr. SWEET: With reference to the conductor who jumped from the train, whether he did signal the engineer.

The COURT: You may ask that.

Q. Did you see any persons jump from the train?

A. Yes, sir.

Q. Who were they?

A. Two who were riding in the car where the conductor always comes.

Q. Was the conductor there?

A. Yes, sir; he was one of those who jumped.

Q. What sign or signal, if any, did he make?

A. Not that I saw. I didn't see him make any.

Mr. SWEET: That is all.

Witness retires.

Court adjourns to 9 a. m., December 14, 1909.

108 MIGUEL HURTADO being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Interpreted.

Q. State your name, age and residence, captain.

A. Miguel Hurtado.

Q. Present residence.

A. Aguadilla.

Q. Age.

A. Thirty-six.

Q. Occupation.

A. Chief of the district, second class, of the insular police.

Q. How long have you been on the police force?

A. Near eleven years.

Q. Do you remember an accident that occurred in Aguadilla on the second of April this year, in which one brakeman Birch lost his life?

A. Yes, sir.

Q. Were you present at the scene of the accident?

A. I was called about five minutes after the accident.

Q. Did you have any occasion to examine the wheel of the car that was broken; the car wheel?

A. Yes, sir.

Q. State what the result of your examination was.

Mr. CORNWELL: Now I object to that because he has not shown that he knows anything about wheels.

The COURT: I don't know. Anybody could tell that much. That isn't an expert opinion called for at all; the mere fact. You can cross examine him.

109 Mr. SWEET: It is not intended to ask the captain anything requiring an expert knowledge.

Mr. CORNWELL: I make the objection upon the same grounds as before, that the best evidence would be the wheel itself, which is in the jurisdiction of the court and that there has been no showing made that they could not produce it in court.

The COURT: Overruled.

Mr. CORNWELL: Note an exception.

A. When I arrived at the scene of the accident I found two cars that had capsized; one had entirely capsized and the other was leaning against a house. The car that had entirely capsized had a broken wheel on the right hand side, which I caused to be removed and it was placed on a hand car which was there. A sixth part of the wheel was missing or lacking. The broken portion of the wheel had a crack which was rusted, about three inches long and three fourths of an inch deep. I caused a search to be made for the broken pieces of the wheel.

The COURT:

Q. And did you find them?

A. I put them together. We found a larger piece. We placed it on the wheel and there was a small piece lacking, and then we found the other piece which was of this shape, triangular, and we completed the wheel and I called the attention of the municipal judge.

Mr. CORNWELL: I object to what he and the municipal judge did.

A. With reference to the crack.

The COURT: That is not material, that he called the attention of the municipal judge.

Mr. SWEET: We don't care for it.

Q. Where did you find these cars with relation to the switch?

110 The COURT: Put it the other way. They don't understand the question with relation.

Q. How near the switch from which the trains pass down to the playa did you find these two capsized cars?

A. Right at the switch.

Q. Did you follow back over the track in the direction whence the train came and make any examination of the track?

A. Yes, sir.

Q. What did you find?

A. In a distance of fourteen rails up I found that the ballast of the track was all smashed or destroyed and had been removed, and from there forward at a distance of about the same length, the rails showed signs of having small particles shaved off.

Q. Great friction do you mean?

Mr. CORNWELL: I object to that as suggesting the answer to the witness.

The last answer of the witness was read by the Stenographer at the request of the Court.

The COURT: That answer as it is, is enough.

Cross-examination by Mr. CORNWELL:

Q. What was the number of that wheel that you took off of the car?

A. I didn't see any number.

The COURT: The Court says that you can show the man the wheel if you have got it, and ask him if that is the wheel, on cross examination.

Q. Who was the maker of that wheel?

A. I don't know him.

111 Q. You say that you as captain of the police made an investigation of it and did not take either the name of the manufacturer of the wheel or the number of it?

A. I confined myself to removing the wheel and putting the pieces together.

Q. Well you were making an investigation of it, weren't you?

The COURT: Now, Mr. Cornwell, you have got the benefit of that.

A. I was not investigating the wheel.

Q. You looked to see if there was a crack there didn't you?

A. I observed it incidentally.

Q. (A piece of the broken wheel is brought into the court room.) Is that the piece that you got on the track?

A. It looks like it.

The COURT: Wait until they bring in the whole of it.

Q. Did you mark it in any way to know whether it was or not?

A. No, sir.

The remainder of the wheel is brought into the court room and the Court and the jury examine it.

Q. Is that the wheel that you examined?

A. The broken portions were similar to that.

Q. Have you ever examined wheels? Do you know anything about mechanical iron?

A. No, sir.

Q. Do you know whether that crack took place after the accident or before, if there is such a crack?

A. I suppose it existed before.

Q. Now show just where it existed in the wheel. Where was the rusty place?

112 A. All this was entirely white with the exception of a stain there (indicating on the broken wheel). The rest was entirely white except that part.

The COURT: Show the jury exactly where this crack was. Where is the rusty crack? What was rusty is what we want.

A. (The witness takes the piece of broken wheel and holds it up in front of the jury and indicates on it with a pencil the portion where he says the rust existed. He stated incidentally that it did not extend outside and marked the lines about two and a half inches from right to left and extending out on a brace of one of the spokes

of the iron wheel where the rust existed. All the rest he said was completely fresh, white, broken cast iron or whatever it is, at the time he saw the wheel.) The foregoing statement was dictated by the Court for the record.

Mr. SWEET: I think that to complete that it would be well to state that at the present time the whole wheel is rusted over.

The COURT: Although at the present time the whole wheel is rusted over.

Mr. CORNWELL:

Q. How long after the accident did you examine the wheel?

A. Half an hour.

Q. What men of the company were there when you examined it; what officials of the railroad company?

A. I don't remember exactly but there were some employees of the company.

Q. Well, who were they?

A. They were those employees who put the wheel on the hand car, but I don't know who they were.

Mr. CORNWELL: That is all.

Witness retires.

113 EUSEBIO BLAS RIOS being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Interpreted.

Q. State your name to the jury.

A. Eusebio Blas Rios.

Q. Where do you reside?

A. In Aguadilla.

Q. What is your occupation?

A. Merchant.

Q. Age.

A. Thirty-six years.

Q. How near to the switch on the American railroad, from which freight trains leave the main line to back down to the playa, do you live?

A. Opposite or in front of it.

Q. Are you acquainted with what occurred at that switch on the second day of April of the present year in the way of an accident, in which one Birch lost his life?

A. Yes, sir.

Q. Did you see it?

A. Yes, sir; I saw it.

Q. What was the speed of the train when it came around the curve and met that switch?

Mr. CORNWELL: That is objected to and I have an authority here on that point which I got you during the night. (Cites and reads from authority in question.)

114 The COURT: I agree with that but that is not the reason for this question. You wholly misapprehend the Court's position because you have already made this point two or three times. The speed of the train as the Court will permit it in this case will be with reference to the ability to stop it.

Mr. CORNWELL: That is just the point that is being made in this case. That is just what the Supreme Court of Iowa held, that the railroad is under no duty except at street crossings; it owes no duty as to being able to stop quick.

Mr. SWEET: I have an authority exactly to the contrary.

The COURT: This is the reason for it (reading from the employers' liability act). That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Now if it shall turn out that you have no safety appliances on your railroad, then the speed of the train becomes very material.

Mr. CORNWELL: There is no allegation of that kind in the pleadings.

The COURT: I don't think it is necessary.

Mr. CORNWELL: A man can just come in and say he was hurt on a railroad?

115 The COURT: Yes, that is about all he has to say under the employers' liability act I regret to say. If I had drawn the act I would have drawn it differently.

Mr. CORNWELL: Note my objection and exception.

Q. (The last question was read by the Stenographer).

Mr. CORNWELL: It is objected to on the ground that it is immaterial.

A. It was at a high rate of speed.

Q. What became of the switch or how was it affected?

A. It was carried away by the car.

Q. Did you go down to the switch at the time?

A. Yes, sir; I did.

Q. What did you do there?

A. I helped to take out the body.

Mr. SWEET: That is all.

Cross-examination by Mr. CORNWELL:

Q. What do you mean by, the switch was taken away?

A. That the car struck the lever of the switch and pulled it down.

Q. You mean that switch stand that stands up, the car fell over on it, don't you?

A. Yes, sir.

Q. Didn't the train stop right there at that point?

A. No, sir; a little further up.

Q. How far?

A. About six meters.

Q. You say that train was running fast. How many kilometers an hour was it running?

A. I haven't the honor to know that.

Q. How do you know then that it was running fast?

116 A. Because I saw it and I have ridden on those trains.

Q. Well, was it running like it usually runs?

A. As it was going through the open country.

Q. Well, was it going like trains usually run there every day?

A. Yes, they always pass with a high rate of speed there.

Q. Then it was running as it always runs, was it?

A. No, it was running faster.

Q. Much faster?

A. Yes, sir.

Q. Was it running twice as fast?

A. About once faster.

Q. Then if it ordinarily ran twenty miles an hour it was running forty miles an hour was it?

A. I don't know about miles, it was running fast.

Q. Now doesn't that train always stop there at that switch?

A. It always stops there but this time it stopped further up.

Q. About six meters you said?

A. Yes, sir; in front of a house of a man named Lasalle.

Q. But right there within six meters of the switch?

A. Yes, sir.

Mr. CORNWELL: That is all.

Witness retires.

117 GREGORIO SOTO being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Interpreted.

Q. State your name and residence and age.

A. Gregorio Soto; Aguadilla; thirty years old.

Q. What is your occupation?

A. Merchant.

Q. Do you know where the switch in Aguadilla from which the American railroad company runs its trains from the main line down to the playa, the freight trains, is?

A. Yes, sir.

Q. Did you see an accident at that switch on the second of April of this year?

A. I did.

Q. Where were you?

A. I was about fifty or sixty meters distant when the accident happened.

Q. Did you see the train after it passed around that curve to the switch?

A. Yes, sir.

Q. How was it running?

A. It was running pretty fast.

Q. How was it running when those cars went over?

A. I cannot state the velocity, but as I have ridden on trains I know that it was going pretty fast.

Mr. SWEET: Take the witness.

Cross-examination by Mr. CORNWELL:

Q. How far were you from the switch when the accident happened?

118 A. I am not well acquainted with the measures in meters but I think that I was about fifty or sixty meters; I was very near.

Q. You said that the speed of the train was very fast when the wagons actually turned over.

A. Yes, sir; because the car derailed or got off the track here and the engine went pretty far from there.

Q. How far?

A. About thirty meters, more or less; I cannot explain well.

Q. Before it came to a stop?

A. Yes, before coming to a stop.

Mr. CORNWELL: That is all.

Witness retires.

119 GEO. S. FINDLAY being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

A. Mr. Findlay, what position, if any, do you hold with the American Railroad?

A. Master of transportation, northern division.

Q. What appliances, if any, known as the safety appliances for railroad cars do you have on these freight trains?

Mr. CORNWELL: That is objected to on the ground that it is a point not raised in the pleadings; it is not in issue. There has been no question made up by the complaint or the answer.

The COURT: It will be overruled under the act of Congress.

Mr. CORNWELL: Note an exception.

Q. You are acquainted with the nature and make-up of that freight train that day?

A. Yes, sir.

Q. Did you have any air brakes on that train?

A. No, sir.

Q. What appliances did you have, known as safety appliances, for handling and stopping the cars?

A. On the cars only the hand brakes and on the engine the vacuum brake.

Cross-examination by Mr. CORNWELL:

Q. What was the size of that train, Mr. Findlay?

A. The size consisted of an engine and seven cars.

Q. How many tons was it?

A. Not counting the engine it was 97 tons.

Mr. SWEET: I am going to object, although I don't seriously object. It is not cross examination.

120 The COURT: I am going to permit that.

Q. How long have you been in the railroad business, Mr. Findlay?

A. Eleven years.

Q. What departments?

A. Transportation and traffic.

Q. With what railroads?

A. With the Pennsylvania Railroad and the American Railroad of Porto Rico.

Q. Now from your knowledge of railroading and the engine in question, were the brakes powerful enough to control that train?

A. Without question.

Q. In other words, it needed no other brake outside of the brake on the engine to stop the train at any time?

A. Absolutely none; at that particular point the train only had 97 tons. The schedule that is allowed that class of engine is 245, and if the engineer with his engine brake cannot stop seven cars with that load, the engine must be very poor.

Q. The engine must be very poor. What was the condition of that engine?

A. Brand new, first class.

Q. Of what make?

A. The American Locomotive Works.

Q. At the time of the accident how long had it been in service?

A. Five or six months; I cannot be positive about it, but it was practically new.

Q. How old was the car which was in the accident?

A. The car No. EE-5 was less than a year old.

Q. By whom was it made?

121 A. A concern called Kilbourn & Jacobs.

Q. It is an American car?

A. An American car.

Q. Did the car have brakes on it, Mr. Findlay?

A. Hand brakes coupled with both trucks.

Q. How many brakemen were on that train of seven cars?

A. Two brakemen.

Q. What other employees were on the train?

A. Conductor, engineer and fireman.

The COURT:

Q. How many tons were on the particular car where the wheel broke?

A. I can tell you that by the report there.

Q. Refresh your recollection. You say there were 97 tons in the train only. If it was all on this one car it would make a difference.

A. (After referring to a document.) Thirteen tons calculated from San Juan to Mayaguez; in all including the weight of the car,

but that was the conductor's car. Freight was being taken out and delivered at stations and picked up. It probably had been reduced to some seven or eight tons or probably less.

Q. I thought it was the car in front of the caboose that killed the man.

A. We don't always run the caboose here on the end of the train.

Q. You don't?

A. No, we don't have any caboose but we use what they call in the States the peddler car, which is used to receive and to peddle freight.

Q. What was the weight of the car, Mr. Findlay?

122 A. The weight of the car load was ten tons and the weight of the car alone was 4556 lbs.

Mr. CORNWELL:

Q. Do you know whether the brakes on this engine were in condition that day?

A. From my own personal knowledge of that day I do not, but I do know that it ran from San Juan to Aguadilla and continued in the service regularly.

Q. Without any repairs?

A. Without any repairs.

Witness retires.

123 S. J. LUNDT being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Q. State your name.

A. S. J. Lundt.

Q. Age.

A. Thirty years.

Q. Residence.

A. San Juan.

Q. State your profession.

A. Engineer.

Q. What kind of engineer?

A. Mechanical engineer.

Q. Will you state to the Court and jury what training you have had.

A. Both technical and practical.

Q. Well give the technical first if you please.

A. Private study and schools.

Q. State what that is please.

A. Scranton Correspondence School.

Q. State what experience you have had.

A. I was with the General Electric Company for two years, of Schenectady, N. Y., then with the American Locomotive Company of Schenectady, N. Y., for two years.

The COURT:

Q. What were your duties while so engaged, Mr. Lundt?

A. With the General Electric I had charge of the wheelwright gang, directing work and repairs and looking after the plant in general. And with the American Locomotive Company I was a draftsman.

Q. What education have you had or experience have you had with reference to testing the strength of steel and being able to
124 determine the effect of breaks and cracks and whether they could be distinguished on an inspection or could not?

A. Various; particularly with the General Electric where my duties were to investigate machinery in general and test it.

Q. Test it for what purpose?

A. For breaks particularly.

Q. How much experience have you had there?

A. Two years, more or less.

The COURT: The Court will hold him qualified.

A. And later of course I have had considerable experience both in the States and in Porto Rico.

Mr. SWEET: If he has had other experience he may state it.

A. I was Assistant Consulting Engineer of the Fajardo Sugar Company constructing their plant.

The COURT:

Q. Erecting their plant

A. Yes, sir; everything in the plant.

Mr. SWEET:

Q. Mr. Lundt, how would you test a car wheel that was in use, a wheel that would be covered with the dust and grease following its use in transportation business? How would you test that wheel for a defect?

Mr. CORNWELL: Now I object to that. The question is whether the method we used is proper.

The COURT: This is true. He may give one or two good ways.

Mr. CORNWELL: The question is whether this wheel was sufficiently tested.

The COURT: Counsel I can see is leading to the question where he will ask this witness what would be the ordinary way to test it, and
125 the question: Could you detect a crack by tapping it with a hammer. You may show him this wheel and ask him if this crack could have been detected by that sort of procedure. If the defendant used some other method, they may show it in their defense.

Mr. CORNWELL: The point I made is that there is no question of that kind yet involved. There is no issue of that kind yet before the jury.

The COURT: Yes, there is. You stated in your argument before the jury that it was an inevitable accident.

Mr. SWEET: We allege it distinctly in the complaint.

The COURT: The gentleman just stated you did not.

Mr. SWEET: We certainly did and I can read it if Your Honor wishes. (Counsel reads from the complaint as follows:) Plaintiffs allege the death of said Birch to have been caused by failing to cause a proper inspection of said car.

The COURT: It is affirmatively stated in the complaint. Proceed, ask the question.

Q. (The last question was read by the Stenographer.)

A. By striking it with a hammer.

Q. Supposing this car wheel in use in its ordinary function contained in it a crack two or three inches in length and from a half to three-quarters of an inch in depth, would a proper inspection of that wheel in the manner you have stated, discover the defect?

A. Most undoubtedly it would, yes.

Q. Why?

A. For the reason that by striking the wheel with the hammer, certain vibrations are produced in the wheel and the two
126 lips of the break would be striking together all the time and producing a discord which could be distinctly heard by the man striking the wheel.

Q. What is the common method of inspecting car wheels in the railroad transportation business?

A. By striking the car wheel with a hammer. There is no other method possible or feasible.

Q. What is the effect if the wheel is perfect?

A. It will give a true ring.

Q. And if not?

A. A discordant ring; that is the principle underlying the inspection.

Q. What other method of inspection is in use?

A. None other that I know of because no other is feasible.

Mr. SWEET: Take the witness.

Cross-examination by Mr. CORNWELL:

Q. How many wheels have you ever inspected?

A. That is difficult to say; a number, both wheels and pulleys and wheels of locomotives.

The COURT:

Q. Well can you say hundreds or dozens?

A. Yes, hundreds I can say.

Mr. CORNWELL:

Q. Of course in your experience you have seen lots of wheels break haven't you?

A. Yes, sir.

Q. What was the cause of their breaking?

A. It is impossible to tell.

Q. They rang true didn't they and then broke?

A. No, sir.

127 Q. You never saw a wheel that rang true and then broke?
A. You mean at the time of inspecting it?

Q. No, but after putting it in service did it break without any unusual strain after it rang true on the test?

A. Not to my knowledge.

Q. You never heard of any?

A. No, sir.

Q. Aren't many accidents on the railroads caused in that way?

A. Yes, but the accident has a foreign cause which caused the wheel to break.

Q. What caused it to break?

A. Jolts, strikes, blows, defects, original defects.

Q. Sometimes the casting being bad?

A. Bad casting, yes, improper chilling.

Q. Look at that wheel and give me your opinion on what you think caused its breaking. You are an expert.

The COURT: If that wheel was under a car weighing about four tons and having a load of about ten tons and going at an ordinary rate of speed. A witness, Mr. Lundt, said that he saw this wheel within a half an hour after the break and that like all broken iron it was generally white like silver except that along here where I indicate about two and one-half inches across there was a black spot rusty. That stopped here and didn't go out where you could see it. Now would or would not in your opinion that much of a break there have caused the breaking of the wheel?

A. Yes, it would cause the breaking of the wheel because as soon as that struck an object or even a rail standing a little bit higher than the other, it would cause a jolt on the wheel that would be bound to break it.

128 A JUROR:

Q. What does this condition of the wheel indicate; any imperfection in the wheel?

A. That looks as if it was blow holed, that is, air got in the casting.

Q. That would weaken it?

A. Yes, sir.

Q. What is the smallest kind of a crack that you can discover by the hammer method that you indicate?

A. That would depend largely on the man making the test; if he had a sensitive, proper ear and paid proper attention, he would discover even half an inch because it produces certain discords, and that is the principle on which the test is based. He ought to be able to distinguish between the true ring and the discordant ring.

Q. Would he be able to discover the defect if there were blow holes?

A. No, because the two lips of the crack that produce the discordant ring must strike together.

Q. The blow hole would weaken the wheel but would not cause the discordant ring?

A. No, that is the fault with castings.

Mr. CORNWELL:

Q. I wish you would examine that carefully on both sides and see if you can discover any defects in the casting of the wheel.

A. Well, I should have to have a better light.

The broken wheel is carried to the window.

The COURT: The Court is not going to hold that a defect in casting not discoverable by ordinary inspection would bind you?

Mr. SWEET: Ordinary inspection we think we can show you won't do under this act.

The COURT: Make it extraordinary if you want; if the act says that.

129 A. (The witness examines the broken wheel at the window and takes his seat again and the last question is read to him. I have examined it and of course being covered with dirt, it is impossible to see any defects by the eye, but the small piece rings true and the big piece does not, showing that it may have other defects at present, showing that it is an unsafe wheel.

Q. How often do you inspect wheels in the States?

A. I believe the rule is every day on trains.

Q. On freight trains?

A. I don't know; I am not a railroad man.

A. As a matter of fact, where the climate changes and becomes hot and cold, the wheels suffer a great deal of expansion and contraction; do they not?

A. The contraction and expansion is too slight in a wheel to affect it.

Q. That doesn't affect it you think?

A. Not a bit in a wheel.

Q. Don't all railroads in the winter time make a much closer examination of their wheels than they do in summer?

A. Due to the crystallization of the wheel; due to its long usage the wheel crystallizes.

Q. Now, Mr. Lundt, as a matter of fact, aren't the majority of the breakages of these wheels due to the casting of the wheel and not the cracks; the cooling is too quick or something; isn't that the cause of the breakage of the majority of those wheels?

A. I don't know the statistics as to that. It may be but I am not sure. Every crack or every break may be traced back to an original defect.

Q. Suppose the wheel in the casting is porous, doesn't that weaken the wheel?

130 A. It surely would.

Q. Is that a porous casting?

A. No, it is not a porous casting.

Q. Does that casting show that it cooled too quickly?

A. No, I shouldn't say so. It is difficult to tell now.

Q. But any one of those causes might cause the breakage of the wheel?

A. Any one of which causes?

Q. The cooling of the casting too fast or a porous casting.

A. If it cools too fast it would crack when it cools.

Q. As a matter of fact there is nothing sure about a cast wheel is there?

A. Yes, there is.

Q. Cast iron is always doubtful as to its tensile strength; it varies with every casting doesn't it?

A. Yes, but it is subjected in the foundry to a certain inspection and a lot of them are rejected right in the foundry.

Q. Do you know the manufacturer of this wheel?

A. I know them in a way. I was chief engineer in a company right near them in Ohio.

The COURT:

Q. Are they a responsible concern making good goods?

A. They are.

Mr. CORNWELL:

Q. Do they make an inspection of their wheels before they go out?

A. It is to be assumed that they do. I have myself ordered cars from them for the Fajardo Sugar Company.

Q. And if a wheel had a defect in it and did not ring true, it would never be sent from the foundry would it?

A. That is to be assumed; yes, sir.

Q. You never tested any wheels on a railroad?

131 A. I have worked in every department of mechanical engineering.

Q. I understand, but you never worked on a railroad.

A. I never worked as brakeman.

Q. Don't you know that they often hit those wheels in the yard and they ring true and after they go out on the road they break?

A. No, I don't know of any specific cases.

Q. Don't you know of them coming back to the foundry?

A. They never come back to the foundry.

Q. But they report them to the foundry. Don't you know of the foundries that you have been connected with getting these reports from the railroads?

A. Yes, of course.

Q. Didn't they state that the wheels were regularly and duly inspected and, notwithstanding this, the breakage happened?

A. I cannot make any deposition as to that; I am not sure.

Q. What is the custom; is that the way these reports come in?

The COURT: What light does that throw on anything here?

Mr. CORNWELL: It shows very plainly the custom, that these wheels are inspected and notwithstanding that they break.

Q. What is the life of a wheel of that kind; what is its ordinary life. How many miles ought it to run?

A. I haven't my data at hand; I couldn't say. Usually an engineer keeps with him this data and doesn't keep them in his head.

Q. But you know how many miles a wheel ought to run, don't you?

A. Yes, and I know so many other formulas that it is impossible to recall it now.

Q. Isn't it about forty thousand miles?

A. I should consider that a high figure for a wheel to run

132 Q. You consider that a high figure?

A. Yes, without having my data before me to consult.

Q. A wheel that had run 6818 miles; what would you consider that?

A. After it had run that distance, an old wheel.

Q. An old wheel?

A. Certainly, a wheel of considerable use.

Q. How many miles do you think a wheel ought to run?

A. I would rather not answer that question. I haven't my data before me. Usually or as often happens, a wheel runs until breaks.

Q. There are eight wheels of that class on the car in question. What tonnage ought these wheels to hold up?

A. That would not be determined by the wheels so much as by the axle. The wheels are usually made with a large factor of safety. In other words, made five or six or perhaps ten times stronger than they need be.

Q. The capacity of that car was ten tons and it weighed four tons. Do you think that was a heavy load for the wheels?

A. That would distribute the weight less than two tons per wheel. Certainly it should be sufficiently strong to carry that.

Q. That leaves a large margin of safety doesn't it?

A. It does.

Mr. CORNWELL: That is all.

Witness retires.

133 E. B. WILCOX being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. SWEET:

Q. State your name, age and residence.

A. E. B. Wilcox; thirty-nine years; San Juan.

Q. You are of course familiar with the matter in controversy here, Judge.

A. Yes, sir.

Q. And will you please state to the Court and jury the result of your examination of the wheel in question at Aguadilla?

Mr. CORNWELL: I will object to that unless he shows it was immediately after the accident, or state the time and place.

A. In Aguadilla; after we were employed in the case, I immediately went to Aguadilla to look the ground over.

The COURT:

Q. How long was that after the accident?

A. I should say it was some four or five days after the accident.

The COURT: I don't know about that.

Mr. CORNWELL: A piece of iron in this climate will oxidize in twenty-four hours.

The COURT: You may cross examine on that.

Mr. CORNWELL: Note my objection and exception on the ground that too long a time had elapsed since the time of the accident.

A. My attention was called to the fact that this broken wheel was in the custody of the municipal judge of Aguadilla and I went with the captain of police and the corporal to examine it, and my attention was called——

Mr. SWEET:

Q. Where was it?

134 A. It was in the office of the municipal judge and I made a very careful examination of the break and I found that a part of the break was undoubtedly old and the rest of the break showed white and fresh. If I had the piece of wheel here I could indicate.

The COURT:

Q. How much, because the jury has seen it?

A. My recollection is that some two and a half or three inches of the break was old.

Mr. SWEET:

Q. What depth?

A. From a half to an inch. I don't remember now exactly, but I do remember very distinctly that this old break or the part that showed rust and the new break were just as clearly distinguishable, the line of demarkation was just as clear as the red and white stripes on that flag, and that this break, the old part of the break, came to the surface; came to the interior lateral surface of the wheel. My recollection is that the break did not extend to the rim in either direction, but the new part of the break was white. It looked like a new silver dollar, while the old part was rusty and showed signs of age distinctly.

Q. Did you examine the track?

A. I did; I walked from the switch clear up to the passenger station.

Mr. CORNWELL: I object to that on account of it being too long after the accident.

The COURT: I won't let you ask Judge Wilcox about that because you have plenty of evidence in this case on that already.

Mr. SWEET: We have a right I think to make it as strong as we can.

The COURT: Proceed and get through.

135 Mr. CORNWELL: The condition of things might change a hundred times in that time. Five days have elapsed since the accident.

The COURT: That is matter of argument for you to the jury, Mr. Cornwell.

Mr. CORNWELL: It is objected to on the ground that they have not shown that there was no change in the conditions.

The COURT: Go on, Judge Wilcox.

A. I walked up this track in the direction from which I had been told the train came, toward the passenger station, that is to say, toward Arecibo, and I found that the roadbed which is covered with small rock or stone, the roadbed on the left hand side of the right hand rail as you would come down the track in the direction in which the train was going, was plowed up. The line was clearly marked; the signs of violence were clearly marked; so much so that you could stand on that track and look up that track and see the line that was plowed for a distance of a hundred yards or more. The broken stones that are used for ballast along there are a sort of limestone which discolors when exposed to the elements, but if you chip it, it whitens, and you could see that line of white as clearly distinguishable almost as if you were to take a lime bucket and mark the lines on a tennis court. That continued about 100 or 150 yards up that track and then it disappeared and where it disappeared, the signs of violence disappeared on the roadbed. There were signs of violence on the right hand rail, and along this rail there were slivers of the rail that had been torn from it. It looked as though some powerful friction had been applied to that rail and slivers of the rail had been torn away from it and they lay
136 some distance from each other; they lay along there on both sides of the track.

Cross-examination by Mr. CORNWELL:

Q. These slivers were all fresh and white?

A. They were.

Q. Showed no signs of rust?

A. I don't know whether I can explain; they were shaped like fish scales, rather longer than broad.

Q. That is not the question I asked you. I asked you whether they were bright or rusty.

A. Where they seemed to have been torn away from the track they were bright?

Q. They were still bright?

A. Yes, sir.

Q. Although four or five days had elapsed after the accident?

A. Yes, sir; although four or five days had elapsed.

A JUROR:

Q. Judge, you said the crack in the wheel showed in the center but did not show to the edge?

A. It showed to the surface on the inner surface of the wheel but not on the outer surface and not up to the rim.

Witness retires.

Mr. SWEET: We have stated in our complaint that the rate of speed of this train was contrary to the city ordinance of Aguadilla.

The COURT: I will hold without further adieu, Judge

137 Sweet, that the third section of this act of April 22, 1908, where it says: Provided, that no such employés who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. It does seem to me under all the circumstances of this case where this is an act of Congress that does not attempt to interfere with the States,—and could not if it wanted to, but does specifically refer to Territories, that it referred in that section to the safety appliance acts or any other act of Congress and that it did not refer to local acts. In other words, I think that when you sue under the national employers' liability act you must recover entirely under that act and if you should sue under the local act, the reverse would be true. And therefore I cannot see, Judge Sweet, how it makes any difference about the ordinance of the city of Aguadilla about speed save in so far as,—and that is why I left the speed evidence in all the way—save in so far as it may show the jury that the train going at such a high rate of speed, if such was the fact, that then after they discovered the break of the wheel, that is the injured condition of the car, they had the last clear chance to avoid any injury, independent of any act, which was their duty at the common and civil law both. The jury will

138 be left to consider whether, if they had the safety appliances contemplated by Congress, they could have stopped the train and avoided this accident.

Mr. SWEET: Then without taking the time of the Court, we have certain documents here which Your Honor might or might not hold amount to an ordinance.

The COURT: Well, present them and I will rule on them.

Mr. SWEET: I offer the following record, the same being the correspondence between Mr. W. F. Willoughby, Treasurer of Porto Rico and a member of the Executive Council, and the Alcalde of Aguadilla, under which they agree to permit said railroad company to pass through the city on the lines indicated.

Mr. CORNWELL: Objected to on the ground that the documents presented don't constitute an ordinance, and on the further ground that there is no such ordinance limiting the speed of trains in the municipality of Aguadilla; and under the further ground that this suit is brought under the national employers' liability act and ordinances of municipalities cannot affect the right of plaintiff to recover.

The COURT: Sustained and the instruments offered are excluded on the ground that in this particular case they are not material.

Mr. SWEET: We ask an exception. That is our case.

139 Mr. CORNWELL: Defendant moves for a non-suit and direction of a verdict in this case; First, on the ground that the plaintiffs have not made out any case showing that the company has been guilty of any negligence. Second, upon the ground that the suit is not brought by any person authorized under the national employers' liability act to bring such a suit. Third, upon the ground that there is not sufficient evidence to support a verdict in favor of the plaintiffs even though the jury should return one. Fourth, on

the further ground that the plaintiffs' own evidence shows that the train in question was always under the control of the engineer and that it could have been stopped at any point, and that it was not running at an unreasonable speed. Fifth, on the further ground that the death of said Birch, as shown by the plaintiffs' own evidence, was caused by his own negligence and not that of the defendant company. Sixth, and upon the further ground that the evidence shows clearly that the death of said Birch was the result of an unavoidable accident due to a latent defect in the wheel of said car and was not due to any negligence on the part of said company, Seventh, and upon the further ground that the suit shows that it is one in favor of the estate of the deceased, when no such action survives under the national employers' liability act.

140 The COURT: Denied and overruled for the reason that the suit being brought under the act of Congress of April 22, 1908, it is properly brought in the name of the only persons for whose benefit any recovery could be had, and it is the opinion of the Court that the words used in section two of the act in question, "to his or her personal representative," cannot be construed to mean that it is necessary, in cases where only the husband or wife could inherit and are the only survivors, that they be forced in the absence of any estate belonging to the deceased other than this right to sue, to have an administrator appointed. The other grounds of the motion are overruled generally as not being warranted under the facts and evidence or any of the clauses of the act of Congress in question.

Mr. CORNWELL: Now I make another motion for a direction of verdict for the defendant and non-suit upon the grounds that the suit as originally filed in this court was between Ann Elizabeth Birch as plaintiff and the American Railroad Company as defendant, and without any permission of the court or previous order of the court, a new cause of action was stated by the addition of a co-complainant Ernest Victor Birch. And upon the further ground that the evidence shows that said Ernest Victor Birch was not a minor nor wholly dependent upon the deceased for support; and that it further shows that since his majority, at least for a major portion of his time, he was at work at gainful occupations.

141 The COURT: Motion denied because the evidence in this case tends to show that the additional plaintiff, though a major heir, was to some extent dependent upon the earnings of the deceased, and the Court considers section two of the act in question to mean that at least unmarried major heirs of a deceased dependent upon him or her to any extent are entitled to recover to the extent of the dependency.

Mr. CORNWELL: There is one point I forgot: And that the evidence further showed that the plaintiff Ernest Victor Birch for the eighteen months before the deceased's death, did not live with the deceased, but resided outside of Porto Rico and in New York City.

The COURT: Overruled for the same reason. Now proceed with the cause.

Mr. CORNWELL: To which the defendant excepts. Your Honor held some matters in abeyance.

The COURT: I rule now that they are all properly in the case under the facts here and the question of speed may go to the jury on the question of whether or not it could have been stopped after they knew of the accident or ought to have known of it.

Mr. CORNWELL: To all of which the defendant excepts.

142 GEO. S. FINDLAY being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?

A. Geo. S. Findlay.

Q. What official position, if any, do you hold?

A. Master of transportation of the northern division.

Q. In April of this year what official position did you occupy?

A. The same on the southern division.

Q. Who had jurisdiction of Aguadilla at that time?

A. I did.

Q. State, Mr. Findlay, the number of the train that caused the death of the plaintiff in this case, Birch.

A. Train 25.

Q. State at what point on the line you assume jurisdiction of that train.

A. From Isabela to Ponce.

Q. Now, Mr. Findlay, taking the records of the railroad, state what time on April second that train left Isabela.

A. 2:50 in the afternoon.

Q. You know that without refreshing your mind?

A. I do.

Q. You had better take the record because I want to get it in evidence.

A. (The witness gets the record in question.)

Q. Now between Isabela and Aguadilla, state from your train record what stops, if any, the train made that day.

A. One stop one kilometer this side of Aguadilla to pick up a car of cane.

143 Q. After you left that point, then what other stop did the train make?

A. At the point of the accident?

Q. Now, Mr. Findlay, state what time the train actually made between Isabela and the point of the accident, and the distance, according to the train sheet.

A. The distance between Isabela and Aguadilla bridge, the station known as Aguadilla bridge station, is nineteen kilometers; the schedule for that train is forty-nine minutes between those points. The day in question the train took actually one hour to make that distance, as shown by the official record of the conductor, counting the probable necessary five or six minutes to take out the car from the switch.

Q. Then what was the speed of the train, Mr. Findlay?

A. I should judge that the speed of that train was not more than twenty-five kilometers an hour.

Q. What is that in miles, Mr. Findlay?

A. Probably eighteen to twenty miles; and that speed was not the same at all points on the road. From the point known as the high point, there is a distance of four kilometers to the point of the accident which is on a grade and naturally the train has to come down there at a reduced speed.

Q. The train sheet shows the time and schedule of that train does it, Mr. Findlay?

A. It does.

Mr. CORNWELL: I will offer that in evidence.

Mr. SWEET: We object to that. That is hearsay evidence.

144 The COURT: It is but it illustrates his evidence. It may be admitted to show that the railroad records and the conductor's report certify that it did run that speed that day; a schedule time of a train.

Mr. SWEET: Save an exception to that.

The document in question was then placed in evidence and marked: Exhibit A for the defendant.

Q. How far is it from the passenger station or the station of the bridge to the switch at the point where the accident happened?

A. 950 meters.

Q. Have you got any official map of the company that shows that, Mr. Findlay?

A. Yes.

The COURT:

Q. Made from the regular surveys of the company?

A. Yes, sir.

Q. That they had to locate the road by?

A. Yes, sir.

The COURT: Do you offer it?

Mr. CORNWELL: Yes, sir; it is offered in evidence.

The map in question was then placed in evidence and marked: Exhibit B for the defendant.

Q. Now, Mr. Findlay, explain to the jury, using this map, where the Aguadilla passenger station is, the bridge station is, and show them the line and where the switch is and the distance, etc.

A. (The witness goes down in front of the jury and explains the map). The white mark indicated in the blue print shows the passenger station at Aguadilla bridge. The kilometer distance from San Juan is marked.

145 Q. What is the kilometer distance at the station?

A. 141 kilometers 700 meters.

Q. That is at the station?

A. At the station at the bridge.

Q. Now state the distance at the switch where the accident occurred.

A. It is known as Ramal de Aguadilla Playa; 142 kilometers 652 meters.

Q. What is the distance between said two points?

A. 952 meters.

Q. Now, Mr. Findlay, have you any other map that shows the grade of the railroad track between said passenger station and the point of that switch or do you know it from examining it and can tell it orally?

A. It runs from one per cent to one and a half.

Q. Have you a map?

A. There is a map there but it is in the meter system and I am used to feet and inches.

Mr. CORNWELL: The company offers another map showing the grade of the railroad at the place in question and the line on each side of it in the immediate vicinity.

The COURT: Is that a correct map, Mr. Findlay?

A. Yes, sir.

Q. You know the ground and the roadbed?

A. Yes, sir.

Q. And it is made by the engineer of the company?

A. Yes, sir.

Q. And it comes from its custody?

A. Yes, sir.

The map in question was then placed in evidence and marked: Exhibit C for the defendant.

Mr. CORNWELL:

Q. Mr. Findlay, how long after the accident did you reach there?

A. From three hours and a half to four hours.

Q. State to the Court at what place you found the two overturned cars. Before you get to that. I am going to follow up Mr. Findlay's testimony. You stated what the schedule speed of the train was until it reached the passenger station. Now from there down to the place of the accident what must it have been?

A. We have got to understand first that that train has got to make a stop at the switch where the accident had occurred. That train has come to a dead stop, to turn the switch and back into the playa to perform regular daily service of freight in that town. It is the only point in that town that we can pick up freight to be loaded.

Q. In order to make that stop what would be the speed of the train, to make that stop?

A. It should not be running more than four or five kilometers an hour, and perhaps less.

Q. State, Mr. Findlay, what that train on that day consisted of.

A. It started with an American engine No. 51.

Q. What pattern of engine?

A. It is an American Locomotive Works engine.

Q. How old is it?

A. That I could not say; I think it is within a year's time.

Q. Is it an old or new engine?

A. A new engine, brand new. There were two cane cars and behind them an H car; that may be reversed and it may be that the two cane cars were behind, and behind those two ordinary French box cars and behind them a large American box car, double truck, and behind that a French car, making a total of seven cars and the engine.

Q. What was the weight of the train?

A. Exactly 97 tons exclusive of the engine.

Q. What is the capacity of that engine?

A. At that particular point, we have a tonnage schedule showing that an engine can pull a given amount of tons of freight or passengers over a particular section. That section is 245 tons per engine of that class.

Q. How many tons did it have?

A. Ninety-seven.

Q. How far from the switch were those two overturned cars; what distance?

A. The two overturned cars were exactly at the switch on the left hand side going towards Mayaguez. The American box car being ahead of the other, was naturally a little further on but exactly at the switch. The proof of that is that we had to arrange the switch in order to get the main line open.

Q. When the car fell upon it, it broke the switch?

A. You must understand that we have a switch lever with a stand on top of which a lamp is mounted and the car had hit the stand.

Q. And that was what was broke instead of the switch itself?

A. Yes, that stand.

Q. Do you know whether there was any freight to pick up that night at the playa?

A. Yes, sir.

Q. Do your records show that you had any freight to take out that day?

148 A. We could not take it out that day. We had to use the track to get the two cars mounted on the track. The large box car fouled the main line and we had to get it clear to let the night train pass through.

Q. As a matter of fact, wasn't the night train held up there that night?

A. No.

Q. How do you know that this train had to stop there?

A. There was freight to be taken out from there because I moved the freight the next day on the same train.

Q. Tell me who the train crew were that day on train No. 25.

A. The engine crew, the engineer and fireman, and conductor and two brakemen.

Q. Who was the engineer?

A. Bem.

Q. The fireman?

A. Smith.

Q. How many brakemen did that train have on it?

A. Two; Arroyo and Birch and conductor Flores.

Q. Was anybody else on the train?

A. I believe there was another fellow, a young boy in the car.

Q. A switchman riding down the line?

A. Yes.

Q. How long had Mr. Birch been working for the company?

A. Birch had been working several years for the railroad company in various capacities.

Q. In what capacities?

A. My own knowledge of what he occupied was brakeman under my jurisdiction. I have only been here three years. He
149 was employed in various other capacities, but we haven't got his complete record for some reason.

Q. What salary did he get?

A. The last salary that he was getting was \$25.00 a month actual salary plus the amount that the railroad company gives all their train men for providing for their food while they are away from their headquarters, which amounted on that run that he was on to forty-five cents a day.

Q. What was his run, Mr. Findlay?

A. From San Juan to Mayaguez.

Q. How many days a month did he work?

A. Twenty-six.

Q. And during the days that he was not working at what point did he lay up?

A. According to the days it struck him, sometimes in Mayaguez and sometimes in San Juan.

Q. How much did you allow him for his keep?

A. Forty-five cents a day; and in addition to that two dollars for uniform which you cannot count with the salary.

Q. You allowed him two dollars also for uniform?

A. Two dollars to buy a uniform.

Q. Will you get the payroll, Mr. Findlay?

A. (The witness produces a paper.) We pay every two weeks. This is for the first two weeks in January, 1909.

Q. Does that show Mr. Birch on there?

A. F. Birch (indicating).

The Court:

Q. Is his signature there?

A. No, sir; these are copies, but they are paid by borderos, men that are on the road. They sign receipts.

150 Mr. CORNWELL: We offer this payroll in evidence.

Mr. SWEET: We haven't any objection to it.

The COURT: Show it to the jury, Mr. Cornwell.

The payroll in question was then placed in evidence and marked: Exhibit D for the defendant and counsel explained it to the jury.

Mr. CORNWELL: That is for the first two weeks of January. Here we offer another for the first two weeks of February.

The COURT: What sum total does it show, Mr. Cornwell?

Mr. CORNWELL: I am looking for it, Your Honor. It shows wages \$12.50; \$5.40 for allowance and \$1.00 for uniform, making a total of \$18.90.

There being no objection made to the admission of this payroll, it was placed in evidence and marked: Exhibit E for the defendant.

Mr. CORNWELL: We also offer a payroll for the second two weeks of January.

There being no objection made to the introduction of this payroll in evidence, the same was admitted and marked: Exhibit F for the defendant.

Q. During the three years that you have been master of transportation of that company has the salary of Mr. Birch ever exceeded \$25.00 a month, Mr. Findlay?

A. No, sir; I would like it understood also that the amount of money allowed each man for 'viajes' is not paid when the man is not in service. If he gets sick or is off, that is not paid.

Q. It is only when he is actually in service on his run?
151 A. When he is actually on his run.

Q. You say you arrived at the scene of the accident about three and a half hours after it happened?

A. Yes, sir.

Q. Did you see the wheel?

A. I seen the large part of the wheel in Aguadilla.

Q. Did you examine it?

A. As far as I could at that time; I looked at it.

Q. Did you see any rust spots on it?

A. The wheel was entirely covered with the limestone ballast and the break in it was completely covered with the white material, but I didn't have time to look at it carefully.

Q. Did you wash it off?

A. No, sir; I was with the wreck train.

Q. Didn't the court wash it off?

A. No, sir; we had taken that wheel out and taken it down to Aguadilla Victoria, which is some 700 meters further on out in the country; 615 meters to be correct.

Q. Then the wheel was not in the town of Aguadilla at all?

A. It was removed to the outskirts; I don't know whether that is in the town of Aguadilla or not; that is 638 meters further on.

Q. From that point what became of the wheel; do you know?

A. I cannot say.

Q. Were you down at the municipal court the next day?

A. No, sir.

The COURT:

Q. Is this the same wheel that is here in court?

A. According to the wheel that I examined at Aguadilla
152 Victoria, it is the same wheel, however that can be more clearly defined by the people who removed it?

Q. But you think this is the wheel?

A. Yes, sir.

Mr. CORNWELL:

Q. Did you examine the pieces of the wheel?

A. No, sir.

Q. You didn't see that piece at all?

A. No, sir.

Q. Did you examine the track above the accident, Mr. Findlay?

A. I didn't walk up there; no, sir.

Q. Did you examine the cars to see how the accident happened, at the point of the accident? Explain to the Court from the position of things how the accident happened.

A. After leaving the Aguadilla bridge station and still going down hill as you get down to the switch where the accident happened, there is a drainage ditch on the left hand side right along on the side which corresponds to the broken wheel on the track, which was the leading wheel on the left hand side. When the accident took place, the car first struck the frog and bounced and lifted the truck up and it slewed and fell into that ditch and naturally a large car like that had to topple over. There is no question in my mind that if that ditch had not been there, that car would have stayed on its trucks and would not have tipped over. You can appreciate that when you have a ditch alongside of the track and when your trucks go into it, something is bound to happen and it is natural to suppose that the weight of the car would throw it over into the open lot that was there.

153 Q. Taking the statement of the witnesses for plaintiffs that that wheel broke about 150 meters before the point of the accident, would a brakeman upon car EE-5 have had ample opportunity to have saved himself from any accident?

This question was objected to by counsel for the plaintiffs, the objection was overruled and an exception taken by counsel.

A. He could.

Q. State how he could.

A. The American box car that we have in mind had a running board running across the roof that a man can sit on. There is a ladder leading down from the brake shaft on the left down the end of the car to the beam and from there he can walk down that ladder and step onto the iron step with the aid of grab irons on the side of the car and drop onto the ground; and if he did not do that, there is only a little space to step from that car to the one ahead of it.

The COURT:

Q. In other words, you mean that he need not have stayed on the car that was bumping along?

A. He need not; no, sir; that is simply a question that in accidents of that kind you cannot determine exactly what you are going to do.

Mr. CORNWELL: That is all.

Cross-examination by Mr. SWEET:

Q. Would you have your brakeman leave his post or would you have him try to stop the train?

A. That depends on what is taking place.

Q. Assuming that he didn't know what was taking place or
154 what was wrong.

A. That all depends on the conditions. If I found a good soft place to jump, I think I would jump, but if I didn't I would stay on and take my chances.

Q. Would you try to stop the train?

A. Yes, sir; I would.

Q. That is what he was doing in this case wasn't it?

A. That depends on the manner as to how he was stopping that train. According to the testimony as I heard it, one hand was up in the air over his head and the other was on the brake. Now it is almost an impossibility to apply a brake with one hand.

Q. Wasn't he a very powerful man, Mr. Findlay?

A. Yes, he was.

Q. A very powerful man?

A. Yes.

Q. In dealing with your men do you ever allow them extra time if they work extra hours?

A. No, sir.

Q. You don't allow them extra time?

A. No, sir.

Q. This includes all allowances that they have?

A. Everything; yes, sir.

Q. Now did you notice the second car that went over; the back car?

A. Yes, sir.

Q. Did the trucks go with it?

A. The trucks were fastened to that car.

Q. Why didn't they go over with the other car; on the American car?

155 A. On the American car; the trucks under all American cars, the trucks are simply held by king bolts passing through into the truck so if the body of the car tips over the king bolt drops out or remains in its position and the truck remains on the track.

Q. You say he could possibly have jumped onto the car ahead?

A. Yes.

Q. If he had thought of doing that and had any assurance that that would not go off the track too; of course he would want to know that. If he had jumped onto the rear car, that car went off the track too didn't it?

A. Yes.

Q. And then he would have been thrown over too if he had jumped onto that car?

A. Yes, but you cannot imagine that he is going to run back thirty feet over the top of that American box car when he could get to the other by taking two or three steps.

The COURT: This is not profitable.

Q. He had been brakeing three years under you, Mr. Findlay?

A. No, I cannot say that he had been brakeing three years under me; probably three years or a little less.

Q. Now do you know where the other brakeman was?

A. Yes, sir.

Q. Where was he?

A. Upon the roof.

Q. How do you know that?

A. From the investigation that I am compelled to make.

Q. Then that is what you are told about it?

156 Q. Then if these other witnesses said that he was not there and that he jumped out of the box car, it is not true?

A. The investigation showed that.

The COURT: That is calling for a conclusion that you and the jury can draw as well as he can.

Mr. SWEET: No further questions.

I desire to give notice to counsel that if we succeed in finding the evidence which we hope to find of experts, we shall present an affidavit to the Court and ask the discretion of the Court to allow us to present it later, notwithstanding that we said that we had rested.

Redirect examination by Mr. CORNWELL:

Q. Mr. Findlay, what is the life in miles of a wheel of this class?

A. 40,000 miles.

Q. Do the records of the company show how many miles that wheel had travelled?

A. They do.

Q. How many miles?

A. 4,000 miles; I can give you the exact figures.

Q. Give it in kilometers.

A. 6818 kilometers.

Q. And what is the life of a wheel in kilometers?

A. From forty to sixty-five thousand.

Mr. CORNWELL: That is all.

157 Recross-examination by Mr. SWEET:

Q. That is the life of a sound wheel is it?

A. The life of the wheels that are placed under those cars by the manufacturers.

Q. Will you please answer the question? Is that the life of a sound wheel?

A. Yes, sir; of a good sound wheel.

Q. And not the life of an unsound wheel or a defective wheel?

A. No, sir.

Mr. SWEET: That is all.

Witness retires.

158 FRANCISCO ROCHE being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?

A. Francisco Roche.

Q. How long have you resided in Porto Rico, Mr. Roche?

A. More than two years and a half.

Q. What is your position or occupation?

A. I am the chief engineer of the rolling stock, in charge of the rolling stock of the company and at the time of the accident I was deputy chief of my present position now.

Q. What technical education have you had?

A. I am engineer of arts and trades in France.

Q. Where did you study in France?

A. In France in the school of arts and trades of Angers.

Q. Are you a graduate of that school?

A. Yes, sir.

Q. Do you remember an accident that happened on the second of April this year where a brakeman named Frank Birch lost his life?

A. Yes, sir.

Q. How long after the accident did you arrive at the scene of the accident?

A. I came with the relief train.

Q. Well, how long was that after the accident?

A. About half past six in the evening.

Q. Did you have occasion to examine the wheel on your arrival?

159 A. As it was late and as it was dark, I had no opportunity to examine well the wheel, but in the morning the next day, early in the morning I went out and examined the wheel.

Q. Look at that wheel over there and say whether that is the wheel you examined or not. It is right there by the window.

A. (The witness goes to the window to examine the wheel and then takes his seat again.) It is the same class of wheel; to my recollection, it is the same class of a wheel and it is broken in the same parts as the other one. I didn't make any mark on it.

Q. Now when you examined that wheel the next morning what condition did you find?

A. I noticed a portion which showed a new breakage and the part where the grains of the iron had become smashed where it had pressed against the rails. The whole thing was fresh except that part which was smashed with the rail. And I also witnessed the investigation made by the judge of Aguadilla to examine that portion in the examination of that fragment. The piece showed all over that the breakage was new.

Q. Any evidence of oxidation at the point of breaking, or rusting?

Mr. SWEET: I object.

The COURT: He has a right to ask that now because you have evidence to the contrary in.

Mr. SWEET: We take exception on the ground that it is leading.

A. No, sir; we made that same examination in the Aguadilla court and we examined the wheel there and we did not find
160 any mark of any old crack, and I said sure if there was any sign of breakage in the broken piece, the same sign must appear on the other portion of the wheel.

Mr. SWEET: I move that that be stricken out; what he said to the judge of the municipal court.

The COURT: That cannot have any effect; his own testimony of what he saw there is better evidence. I won't rule it out at this time because it refers to a piece of the wheel.

Mr. SWEET: Take an exception.

Q. Where was the piece of the wheel?

A. When I arrived at the place an employé of the company told me that a policeman had taken away that piece of the wheel.

Mr. SWEET: I object to that and move to strike it out.

The COURT: That is immaterial one way or the other; it doesn't prove anything. Overruled.

Mr. SWEET: I take an exception on the ground that it is hearsay.

Q. What did you do with the wheel?

A. I returned to Ponce and I sent a gang with the axle and the two wheels and with instructions to put a new axle and new wheels so as to fix the truck in order that the car might be carried to the repair shop, and the axle with the two wheels, the broken wheel and the other one, were sent to San Juan to the workshops where we have a hydraulic machine whereby we could remove the wheels from the axle.

Mr. SWEET: I move to strike that out. It should be stricken out; it has no bearing on the case for the reason that it has already been shown by the witness himself, and it is a fact, that
161 this broken wheel was not on the axle; and second, that he does not know whether it was taken to San Juan or not as he was in Ponce. I move to strike it out as hearsay.

The COURT: It won't be stricken out because you can cross-examine him.

Mr. SWEET: Note an exception.

Q. Who sent the wheel to San Juan?

A. I gave instructions to the chief of the gang to send it in to San Juan.

Q. When did you give those instructions?

A. On the following day after the accident; the next day after the accident.

Q. Do you know when it was sent?

A. I cannot state exactly the date; it might be two days or three days, because they fixed the car and then they sent the wheels to the car.

Mr. SWEET: I move to strike that out because it is not responsive to the question.

The COURT: That is for the other side to move. You will have full opportunity to cross examine.

Mr. SWEET: I take an exception.

Q. In the meantime where was this broken wheel located, if you know?

A. It was on the truck. We changed that wheel with its axle by a new wheel and a new axle to send it to San Juan, and all
162 that change, all that work was done in a switch in Aguadilla called Victoria.

The COURT:

Q. Do you know how soon that wheel that was actually broken was brought to San Juan after the accident, of your own knowledge?

A. I cannot state that because at that time I was assistant engineer at Ponce, between Isabela and Ponce.

Q. Then you don't know whether it was brought to San Juan in four or five days or not?

A. I cannot state the day that it arrived here but I can state the date when I gave orders to send it up.

Mr. CORNWELL:

Q. Well, what date did it arrive here?

A. I don't know.

Q. Pending the time that the wheel was shipped to San Juan, the broken wheel and the axle, where was the wheel; where did you deposit it?

A. First in the switch Victoria at Aguadilla and next on a wagon, on a car to bring it to San Juan.

The COURT:

Q. Was it on a wagon before you left Aguadilla?

A. No, sir; it had not yet been removed.

Q. All you know then is that you ordered it to be done.

Mr. CORNWELL:

Q. Show on this map here (using Exhibit B for the defendant) where the Aguadilla Victoria switch is.

. (The witness points it out on the map to the jury.)

Q. How far is that switch from the switch that goes down to the playa? Look at your map and see.

A. It is the part where the line follows the road.

Q. What is the distance?

163 A. 560 or 600 meters; about fifty meters from the water tank.

Q. Is that outside of the city of Aguadilla?

A. Yes, sir.

Mr. CORNWELL: That is all.

Mr. SWEET: No questions.

Witness retires.

ALEJANDRO FLORES being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Interpreted.

Q. What is your name?

A. Alejandro Flores.

Q. What official position, if any, did you occupy with the American Railroad Company on April the second of this year?

A. Conductor.

Q. On what train?

A. Train No. 25.

Q. You were conductor of the train where a car ran over and killed Birch, weren't you?

A. Yes, sir.

Q. (Showing Exhibit A for the defendant to the witness.) Do you know that train sheet?

A. Yes, sir.

Q. Is that the train sheet of that train?

A. Yes, sir.

164 Q. What time did you leave Isabela? Look at your train sheet and see.

A. 2:50.

Q. What is the regular speed of that train 25; What is its ordinary speed?

A. 25 kilometers per hour.

Q. At what speed was it running that day?

A. Between six and eight kilometers.

Q. I mean what was its speed when it left Isabela when it was out in the country?

A. About twenty kilometers an hour.

Q. What was its speed when it reached the bridge station, the passenger station at Aguadilla?

A. About twelve kilometers per hour.

Q. And when it left there and *and* started to go down the hill what was its speed?

A. Between six and eight kilometers per hour; the train doesn't stop there. It stops farther down.

Q. Where does it stop?

A. At the intersection of the track, the switch to back down to Aguadilla playa.

Q. Where did the accident occur to Birch with relation to that switch?

A. Right at the switch.

Q. What part of the train were you in that day?

A. In the conductor's car, EE-5.

Q. That was the car that fell on the brakeman wasn't it?

A. Yes, sir; who was riding on top.

165 Q. You were in that car when the wheel broke?

A. Inside of the car.

Q. What was the speed of the car at the time the wheel broke?

A. About eight kilometers per hour.

Q. When you first realized that a wheel was broken what did you do?

A. I notified the brakeman so as for him to notify the engineer.

Q. What brakeman did you notify?

A. To Frank.

The Court:

Q. Do you mean Mr. Birch?

A. Yes, sir.

Mr. CORNWELL:

Q. Did you notify any other brakeman?

A. And the other one Arroyo.

Q. Where was he?

A. On the second car loaded up with cane, and then when I notified him he went from one car to the other up to the engine to notify the engineer.

Q. You also said you notified Mr. Birch.

93

A. Yes, sir; he was on top.

Q. Well, did you do anything else?

A. When I saw that the wheel had broken and that the car had derailed I jumped off.

Q. How far from the point of the accident did you jump? How far from where the car tipped over?

A. About twenty meters.

Q. Anybody else jump off besides you?

A. No, sir; because the brakeman had already gone to the engine.

Q. Wasn't there somebody else in the car with you?

A. No, sir; I was alone.

166 Q. Did you see this brakeman Arroyo notify the engineer to stop?

A. Yes, sir; he went from one car to the other to notify him. He was near Frank.

Q. And as soon as he notified him, what happened?

A. The EE-5 struck the house and with the collision with the house the other car overturned.

The COURT:

Q. Couldn't the engineer tell from the fact that the wheel was broken and it was bumping along and their putting on the brakes, that there was something wrong without their telling him?

A. He was controlling the engine, slackening the speed, but as it was down grade he could not stop it immediately.

Mr. CORNWELL:

Q. What happened to you when you jumped off the train?

A. Nothing, I fell down and immediately I stood up and I rushed to get some help from some people who were around to lift up the car.

Q. When you jumped off the train did you fall or roll over or anything of that kind.

A. I fell flat with my face down.

Mr. CORNWELL: That is all.

Cross-examination by Mr. SWEET:

Q. Are you still in the employ of the company?

A. Yes, sir.

Mr. SWEET: That is all.

Witness retires.

167 AGUSTIN BEM being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Interpreted.

Q. What is your name?

A. Agustin Bem.

Q. You were the engineer on train 25 on April 2nd this year when it killed Mr. Birch?

- A. Yes, sir.
- Q. What was the speed of that train when it left Isabela?
- A. When the train left Isabela towards Aguadilla, it was running at the regulation speed of 25 kilometers per hour.
- Q. When you reached the bridge station and going into the city of Aguadilla what was the speed of your train?
- A. Between five and six kilometers per hour.
- Q. Was that your speed as you went down that hill?
- A. The first incline or grade at ten kilometers per hour up to the Aguadilla station.
- Q. Now from the Aguadilla station on what was your speed?
- A. Five or six kilometers per hour.
- Q. Where did your train stop?
- A. About 900 meters after having left the Aguadilla station, the brakeman Cecilio notified me to stop the train.
- Q. And what did you do?
- A. I tried to stop the train; I made an effort to stop the train.
- Q. Well, how much further did you run before you stopped it?
- A. From the time that he notified me to stop, the train ran about fifty meters further.
- 68 Q. Did you *give* any other signals to stop the train outside of the one from Mr. Arroyo?
- A. No, sir.
- Q. When did you first learn that two cars had tipped over?
- A. When I stopped.

Mr. CORNWELL: That is all.

Cross-examination by Mr. SWEET:

Q. Is it the rule to stop the train always by sending a brakeman to the engine to tell you?

Mr. CORNWELL: I object to that. The question is what they did.

The COURT: No, he is entitled to that to show whether they had any better mode.

- A. He was on top of the car and he notified me to stop.
- Q. Then he didn't notify you by telling you as you just said?
- A. No, he was on the roof of the car.
- Q. On the roof of what car?
- A. On the cane car.
- Q. The cane car up next to the tender of your engine?
- A. The second after the engine.
- Q. You didn't see the conductor signal?
- A. No, sir.
- Q. You didn't see Birch signal?
- A. No, sir.
- Q. You didn't hear any people calling to you?
- A. No, sir.

Q. You didn't see the corporal motion to you?

39 A. No, sir.

Q. When you were running at five or six kilometers per

hour, how many yards is required in which to stop your train, a train of seven cars loaded as this train was with the engine that you had?

A. I needed fifty meters to stop.

Q. You need fifty meters to stop in. You didn't feel in your engine any jar from the breaking of this wheel or the train being off the track?

A. No, sir.

Q. Didn't know anything about it until the brakeman came there and told you?

A. No, sir.

Mr. SWEET: That is all.

Witness retires.

170 CECILIO ARROYA being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Interpreted.

Q. What is your name?

A. Cecilio Arroya.

Q. Were you a brakeman on train 25 on April the second of this year when Birch was killed?

A. Yes, sir.

Q. What is the ordinary speed of that train?

A. 25 kilometers.

Q. When you left Isabela that day what was the speed of your train?

A. The regulation speed, 25 kilometers.

Q. What was the speed of your train as you approached the Aguadilla passenger station?

A. Ten or twelve kilometers.

Q. And after you passed the station and started to go down the hill towards the switch, what was the speed of your train?

A. Six or seven kilometers as we had to stop down at the switch.

Q. After you left the passenger station in Aguadilla and passed there, what part of the train were you located on?

A. I was on top of a cane car.

Q. Well what happened after you left the passenger station? Anybody notify you to do anything; did the conductor notify you to do anything?

A. We usually stop the train at the switch Jimenez and it was there that we got on the cars to apply the brakes.

Q. When did you learn that the wheel was broken on one of the cars?

171 A. After the accident happened.

The COURT:

Q. Didn't you know it before that?

A. I noticed the car bumping because I was on the front end.

Q. Didn't anybody tell you to notify the engineer to stop?

A. I saw the signal of the conductor to stop.

Q. Well what did you do when you saw the signal to stop?

A. I got up on top of the car and gave the signal to the engineer to stop and then I went from one car to the other and I jumped to the tender of the engine and notified the engineer that the train had derailed and then I jumped to the ground.

Mr. CORNWELL: That is all.

Mr. SWEET: No cross examination.

172 ERNEST SMITH being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?

A. Ernest Smith.

Q. On the second of last April were you fireman on train No. 25?

A. Yes.

Q. What time, more or less, did you leave Isabela, do you remember?

A. No, I don't remember.

Q. In the afternoon was it?

A. In the afternoon.

Q. About what speed did your engine run?

A. About 25 miles per hour.

Q. What was the speed of your engine when you began to approach the Aguadilla passenger station?

A. About ten or eleven kilometers going down the grade.

Q. And after you left the station?

A. I don't know the speed of the train because I was attending to the fire.

Q. Was it going slow or fast?

A. It was going slow because we were approaching the switch where we had to stop.

Q. When did you first know that there was an accident?

A. When I got the signal from the brakeman.

Q. What did you do when you got that signal?

A. The engineer did all he could to stop the train.

Q. Did you stop it?

173 A. He stopped it at the switch.

Q. After you leave Isabela where is the first stop of that train?

A. The first stop after we leave Isabela is in Aguadilla playa.

Q. That is the switch where you did stop isn't it? Don't you have to stop there at the switch where you did to go down to the playa?

A. Certainly we have to stop there.

Q. What is the speed of your train when you approach that switch every day?

A. I could not exactly say the speed that we get down there.

Q. Slow or fast?

A. Slow.

Q. Because you have to stop there to back down to the playa don't you?

A. Yes, sir.

The COURT:

Q. Were you going to do it that day or were you going by without stopping?

A. We did it that day.

Cross-examination by Mr. SWEET:

Q. You went by the switch to back down to the playa?

A. The train was stopped at the switch.

Q. You passed the switch so that you could back down to the playa?

A. No, the train was stopped on the switch that day.

Q. It was not uncoupled from the other cars at all?

A. I cannot say.

Q. What business are you engaged in now, Mr. Smith?

A. The same employment, sir.

Mr. SWEET: That is all.

Witness retires.

174 ANTONIO DIAZ MARQUEZ being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Interpreted.

Q. What is your name?

A. Antonio Diaz Marquez.

Q. Where do you live, Mr. Marquez?

A. In Aguadilla.

Q. What is your business?

A. Merchant.

Q. Do you remember an accident on the American Railroad Company on the second of April of this year in the afternoon?

A. I do.

Q. About what time was it?

A. Between half past three and four o'clock in the afternoon.

Q. State where you live with relation to the accident. How near do you live to the point of the accident?

A. Near.

Q. Did you see the accident?

A. Yes, sir.

Q. Did you see the train approaching that day?

A. Yes, sir.

Q. About what speed was it running?

A. When it passed in front of my house near the switch it was not running very fast because it had already a broken wheel and the car was bumping.

Q. About what speed was it running?

A. I might say between six and seven kilometers.

Q. Did you see the man that was killed, on top of the car?

175 A. Yes, sir; a colored man; I took him out from under the car.

Q. But when you saw him on top of the car what was he doing?

A. He was holding a wheel.

Q. With one hand or two hands or how?

A. With both hands in this position (indicating), sitting there.

Q. Did you holler out to him?

A. To jump off.

Q. Did he do it?

A. No, sir.

Mr. CORNWELL: That is all.

Cross-examination by Mr. SWEET:

Q. Did you see corporal Soto and Mr. Martinez there that day?

A. After the accident, yes; after they had removed the body of the man and it was placed on a cot there.

Q. But not before?

A. I arrived there at the moment when the accident happened. I was the one who rushed out immediately and he was with half of his body outside and he was making some movements with his hands and then the people came and with levers and an iron bar we lifted somewhat the car and took out the body.

Q. Didn't you cry out to the engineer to stop?

A. Not to the engineer.

Q. Did you not tell Captain Hurtado the next day that the train was running very fast?

A. Not a high speed; that it might have come with great speed from the other station, but when it passed there was a broken wheel; the car was bumping. It had already derailed.

Q. I didn't ask him that. I asked him if he told Captain
176 Hurtado that.

A. No, sir.

Mr. SWEET: That is all.

Witness retires.

JORGE MIANDA being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Direct examination by Mr. CORNWELL:

Interpreted.

Q. What is your name?

A. Jorge Mianda.

Q. On the second of April of this year where were you employed?

A. The master mechanic of the rolling stock of the American Railroad Company.

Q. Do you know car EE-5 of this company?

A. Yes, sir.

Q. Have you ever inspected that car?

A. Several times.

Q. Did you inspect it shortly before the accident of April the second of this year?

Mr. SWEET: I object to that. Of this year.

The COURT: Have him tell when last before the accident he inspected that car.

A. Four or five days before the accident.

Q. Where did you inspect it?

A. In the workshops at kilometer four.

Q. What was the car doing there?

177 A. It had been brought there for repairs because it had the turning plates of the trucks broken.

Q. At that time did you personally inspect the wheels of that car?

A. Of course you have to remove them and I had to examine them.

Q. Well, state what you did.

A. I removed the broken plates and then examined the wheels in the ordinary manner by striking them with a hammer.

Q. Well, what was the result of that inspection?

A. Good; the four wheels were sound, in good condition.

Mr. CORNWELL: That is all.

Cross-examination by Mr. SWEET:

Q. If there had been a crack in one of those wheels two and a half to three inches long and three-fourths of an inch deep, do you believe that your inspection ought to have disclosed it to you?

A. Of course; it would not have been able to run four kilometers in that condition.

Q. Well that was not what I asked. (The last question was repeated to the witness by the Interpreter.)

A. The wheel having the slightest crack, by striking it with the hammer; when the wheel is sound it will sound one way and when it is cracked it will sound different.

Q. You would not get the true ring with that crack in it would you?

A. Of course not.

Q. Do you know whether or not this car had been running
178 all the time, that is to say, had been in active service all the time between the date of your inspection and the date of the accident?

A. That is up to the traffic manager to know that. I inspected it in the workshops.

Q. Can you give the date on which you inspected that car, more definitely?

A. Yes, sir; I have here my note book of repairs.

Q. Is it here?

A. Yes, sir.

Q. Will you produce it?

A. (The witness produces a note book and refers to an entry therein contained.)

The COURT:

Q. What is the date of it now that he has refreshed his recollection?

A. Five days prior to the first of April.

Mr. SWEET:

Q. That would be seven days then prior to the accident?

A. Yes, it is five or six days (here is the record of the last repairs to that car, referring to his note book).

Q. And it was five days before the first of April did you say?

A. Exactly.

Q. What relation is there between this book and this paper?

A. This (referring to the paper which the witness has in his hand) has been drawn in the office as they have taken it from my book.

Q. Is this the way they keep the record in the office (referring to the paper)?

A. Of this note and of the daily reports.

Mr. SWEET: That is all.

Witness retires.

179 Mr. CORNWELL: We rest.

Mr. SWEET: No rebuttal.

Mr. CORNWELL: I want to renew my motion based upon the whole evidence in the case.

The COURT: Overruled.

Mr. CORNWELL: Save an exception.

180

Instructions to the Jury.

This is an action by Ann Elizabeth Birch, the wife, and Ernest Victor Birch, the son, of Francisco Abraham Birch, against the defendant, the American Railroad Company of Porto Rico, in which they lay their damages at the sum of ten thousand dollars and the costs of this suit for the alleged negligent and wrongful killing of their husband and father, which occurred in a railroad accident near Aguadilla in this island at the time indicated by the proofs.

The action is brought under what is known as the Employers' Liability Act of the Congress of the United States, which was passed on the 22nd of April, 1908, and which by section two thereof is made applicable against every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone or other possessions of the United States. The Court instructs you that the language makes this law applicable to, and the law is in force in Porto Rico.

The fact that the plaintiffs are subjects of the King of Denmark and the defendant is a 'citizen' of the United States, being a cor-

poration organized under the laws of one of the States of the Union, together with the amount claimed for damages being more than one thousand dollars, are the facts that give this court jurisdiction to try the case.

This law provides that a defendant shall be liable for the injury or death of any employee when such injury or death results in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, ways, wharves or other equipment. It further provides that in all actions brought under the act, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. It is further provided in that law that in actions brought under it the employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employees.

You are instructed that there is no question about the widow of the deceased being a proper plaintiff in this cause, but the son having been over age at the time of the death of his father, cannot recover save to the extent to which you may believe from a preponderance of the evidence he was actually and necessarily dependent upon his said father for support, and in case you believe from a preponderance of the evidence that he was not necessarily dependent upon his said father, in such event he cannot recover at all and as to him you should find for the defendant.

The liability of the defendant in any event in this case cannot be other than compensatory, because there is no evidence showing or tending to show any malice on the part of the defendant in or about the occurrence in question, and hence you cannot on any account, even though you find against the defendant, impose any punitive or "smart money" damages against it in favor of the plaintiffs, or either of them, and in no event can you impose any greater amount of liability against the defendant, even though you should hold that both plaintiffs on the evidence are properly in the suit, than if there was only one plaintiff.

The measure of damages in this case, gentlemen, is the amount which you believe on a preponderance of the evidence the plaintiffs, or either of them, necessarily lose in or by the death of their husband and father, and in measuring this damage you may take into account, the age and health and expectancy of life of the deceased, his earning capacity, his character, his mode of treatment of his family and the amount contributed out of his wages to them for their support, and calculate from these facts the amount which you as reasonable and practical men believe the plaintiffs lose because of the death.

If you shall believe from a preponderance of the evidence that the deceased himself was in any manner guilty of any contributory negligence in and about the accident, then you should, under the terms of the act, diminish the damages which the plaintiffs would be entitled to in proportion to the amount of the negligence attributable to the deceased, but if you shall believe from a preponderance of the evidence that the violation by the defendant of the law of Congress requiring it to have safety appliances upon its trains and cars contributed to the death of the deceased, or was the proximate cause thereof, then you cannot hold that the deceased was guilty of any contributory negligence at all under the law, nor can you hold that the deceased assumed any risks of his employment, if you shall thus believe that the absence of safety appliances in and about the train contributed to, or was the proximate cause of the injury.

You are instructed, gentlemen, that if you believe from a preponderance of the evidence, considering the same as honest and practical men, and after a full, fair and impartial consideration of all the facts and circumstances of the case, that this accident occurred solely because of a latent defect in one of the wheels on one of its cars, which could not by the exercise of reasonable care commensurate with the dangerous character of the machinery involved, have been discovered and prevented, then the same was what is known in law as an unavoidable accident and no person is responsible therefor, and you should in such case unhesitatingly find for the defendant. In this regard you are instructed that whenever a railroad company buys any car, engine or other implement or piece of machinery from a reputable dealer in such articles and tests them and puts them in use upon its railroad, and from time to time makes reasonably careful inspection thereof, such as is commensurate with the dangerous character of the work being done, then if an accident occurs because of a latent defect contained in the wheels or other parts of such implements or machinery and the same results in the injury or death of any employee, the occurrence is an unavoidable accident and no person is responsible therefor, and if you believe from a preponderance of the evidence, under these instructions as here given you, that the occurrence in question was an unavoidable accident, you should unhesitatingly find a verdict for the defendant.

Gentlemen, the Court desires to call your particular attention to this suit. It is the first we have tried under this Act of Congress in this court in this district. Its purpose on the one hand, as can be seen, is to force railroad companies to take some of the risks of the dangerous machinery and implements they are using, and hence the law is in derogation of many of the common law and civil law rules of contributory negligence, assumption of risk, negligence of fellow servants, etc., that have heretofore been known to the law. Therefore the law should be strictly construed, yet not so strictly as to defeat the purpose which Congress intended to accomplish by it. On the one hand, you should endeavor to do justice to these plaintiffs, and on the other, to do equal justice to the defendant. If you should find for the plaintiffs, or either of them, the damages cannot

go beyond the amount claimed in the complaint, and the Court warns you, as stated, that the law is merely compensatory and that in no manner is the jury authorized to give speculative damages of any sort in such a case.

I have many times instructed you that you are the sole judges of the weight of the evidence and of the credibility of the witnesses, and of your right to believe or disbelieve the whole or any part of any witness' testimony, and of your right to consider every witness' manner of testifying and his or her interest in the result of the cause. I have many times instructed you as to what a preponderance of the evidence means, and that it does not necessarily signify that you must decide for the party having the most witnesses
185 or the greatest number of exhibits, but for the party who in your judgment as reasonable, honest and practical men has truth and justice with it.

It is hoped, gentlemen, that you will arrive at a verdict for these suits are expensive, both to the parties and to the government, but it is not intended to cause any juror to change his mind by this remark, simply to point out as I have often done before, that you are expected to regard the matter under the law as here given you, coldly, honestly and impartially and endeavor to come to an agreement that will be just and that those of you who may be of one opinion may either convince the others to agree with you, or becoming convinced that you are wrong, agree with those that oppose you.

Three forms of verdict will be given you, gentlemen. One will read: We, the jury, find for the plaintiff Ann Elizabeth Birch and assess her damages at the sum of blank dollars; and we also find in favor of the plaintiff Ernest Victor Birch and assess his damages at the sum of blank dollars. The second one will read: We, the jury, find for the plaintiff Ann Elizabeth Birch and assess her damages at the sum of blank dollars; and as to the plaintiff Ernest Victor Birch, we find for the defendant. And the third one will read: We, the jury, find for the defendant. When you have arrived at a verdict, you will cause one of your number to sign it as foreman and all of you return it into court. You may take to your room the complaint, the amended complaint, the answer, all the exhibits and these instructions. The cause is with you, gentlemen.

Mr. CORNWELL: For the purposes of the record, I wish to request the Court for a further instruction: That the Court instruct the jury that the federal act with regard to safety appliances has no application to the question at bar.
186

The COURT: You have your point saved on that already.

Mr. CORNWELL: I also wish to ask that Your Honor modify your instructions as to compensatory damages so that they will read: That they are entitled to recover the actual compensation that they would have received if he had not been killed and that that would be limited to the purchase of an annuity for his recognized period of life.

The COURT: I won't instruct that way.

Mr. CORNWELL: Please note an exception. I will take the general exceptions now, Your Honor, and then fill them in afterwards.

The COURT: Yes.

Mr. SWEET: I ask Your Honor whether or not we would not be entitled to an instruction that if they find the negligence of the engineer such because of the speed of the train, that the train might have been stopped and it was not stopped, that in that event, we would also have the right to recover.

The COURT: That is embodied in the other instructions.

Counsel for the defendant thereafter noted the following specific exceptions to the charge of the Court:

First. To that part reading as follows: "You are instructed that there is no question about the widow of the deceased being a proper plaintiff in this cause."

187 Second. To that part reading as follows: "but if you shall believe from a preponderance of the evidence that the violation by the defendant of the law of Congress requiring it to have safety appliances upon its trains and cars contributed to the death of the deceased, or was the proximate cause thereof, then you cannot hold that the deceased was guilty of any contributory negligence at all under the law, nor can you hold that the deceased assumed any risks of his employment, if you shall thus believe that the absence of safety appliances in and about the train contributed to, or was the proximate cause of the injury."

Third. To that part reading as follows: "You are instructed, gentlemen, that if you believe from a preponderance of the evidence, considering the same as honest and practical men, and after a full, fair and impartial consideration of all the facts and circumstances of the case, that this accident occurred solely because of a latent defect in one of the wheels on one of its cars which could not by the exercise of reasonable care commensurate with the dangerous character of the machinery involved, have been discovered and prevented, then the same was what is known in law as an unavoidable accident and no person is responsible therefor, and you should in such case unhesitatingly find for the defendant."

Fourth. To that part reading as follows: "Three forms of verdict will be given you, gentlemen. One will read: We, the jury, find for the plaintiff Ann Elizabeth Birch and assess her damages at the sum of blank dollars; and we also find in favor of the plaintiff Ernest

188 Victor Birch and assess his damages at the sum of blank dollars. The second will read: We, the jury, find for the plaintiff

Ann Elizabeth Birch and assess her damages at the sum of blank dollars; and as to the plaintiff Ernest Victor Birch, we find for the defendant. And the third one will read: We, the jury, find for the defendant. When you have arrived at a verdict you will cause one of your number to sign it as foreman and all of you return it into court."

I, Arthur J. Harvey, Official Stenographer of the District Court of the United States for Porto Rico, hereby certify that the foregoing document, consisting of one hundred and fifty-six typewritten pages, is a true and correct transcript of all the testimony and the

Court's instructions to the jury in the case of Ann Elizabeth Birch et al. v. The American Railroad Company of Porto Rico, tried in the San Juan Division of said Court at the October Term, A. D. 1909, which said testimony was reported by me in shorthand at the time of said trial and was thereafter by me transcribed from said shorthand notes.

ARTHUR J. HARVEY,
*Official Stenographer of the District Court
of the United States for Porto Rico.*

190 The jury then retired and after a short absence returned into Court with a verdict in favor of the plaintiff Ann Elizabeth Birch for damages in the sum of two thousand dollars (\$2000) on the 14th day of December, 1909.

The foregoing constitutes the testimony, and statement of all the evidence introduced and offered upon the trial of this cause with the instructions to the jury, exceptions thereto, and motions for direction of verdict at close of plaintiff's case and of whole case and exceptions thereto.

I, Bernard S. Rodey, do hereby certify that I am the judge before whom the above entitled cause was tried; that Arthur J. Harvey was the official stenographer of the court who reported said cause; that the annexed and foregoing shorthand report of the evidence, duly certified to by the said official stenographer, is the report of the evidence in said cause and contains all of the evidence offered, given or introduced in said cause by the respective parties upon the trial thereof; all objections and motions of the said parties thereto, or any part thereof, and all rulings of the court upon such objections and motions, and all exceptions to such rulings, as well as the charge of the court to the jury, the objections thereto, the rulings thereon and the exceptions to said rulings; the said report with this certificate is ordered to be filed and made a part of the record in this cause.

Signed this 4th day of February, 1910.

B. S. RODEY,
*Judge of the District Court of the
United States for Porto Rico.*

And the said defendant, American Railroad Company of Porto Rico, on the 4th day of February, 1910, and within the time
191 allowed by law, tendered this its bill of exceptions, it having been reduced to writing and all of the exceptions taken by the defendant during the progress of said trial being embraced therein, praying that the same be signed, sealed and made a part of the record in this cause, which is accordingly done on the 4th day of February, 1910.

B. S. RODEY,
*Judge of the District Court of the
United States for Porto Rico.*

192 In the District Court of the United States for the District of Porto Rico.

No. 633. Law.

ANN ELIZABETH BIRCH et al.

vs.

AMERICAN RAILROAD COMPANY OF PORTO RICO.

I, John L. Gay, Clerk of the District Court of the United States of America, in and for the District of Porto Rico, do hereby certify the foregoing one hundred and ninety-one typewritten pages, numbered from 1 to 191, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this twenty-third day of February, A. D. 1910.

[SEAL.]

JOHN L. GAY,

Clerk Dist. Court of U. S. for P. R.

193 In the District Court of the United States for Porto Rico.

ANN ELIZABETH BIRCH, ERNEST VICTOR BIRCH

vs.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Writ of Error.

The President of the United States to the Honorable the Judge of the United States District Court for Porto Rico, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court for Porto Rico before you, between The American Railroad Company of Porto Rico, plaintiffs in error, and Ann Elizabeth Birch and Ernest Victor Birch, defendants in error, a manifest error hath happened, to the great damage of the said American Railroad Company of Porto Rico, plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the city of Washington on the 14 day of April next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error,

194 what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable B. S. Rodey, Judge of the District Court of the United States for Porto Rico, the 4th day of February, in the year of our Lord one thousand nine hundred and ten.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
*Clerk of the United States District
Court for Porto Rico.*

Allowed by:

B. S. RODEY,
District Judge.

Service of within writ of error and receipt of a copy thereof is hereby admitted this 4th day of February, 1910.

WILLIS SWEET,
Attorney for Defendant.

I hereby certify that:

A certified copy of the foregoing writ is filed in my office, under date of Feb. 4, 1910.

JOHN L. GAY, *Clerk,*
By A. M. BACON, *Deputy.*

195 [Endorsed:] No. 633. Law. Ann E. Birch et al. vs. Am. R. R. Co. of P. R. Writ of Error. 2/4. A certified copy of the within Writ filed in Clerk's Office under date of Feb. 4, 1910. John L. Gay, Clerk. By A. M. Bacon, Deputy. Filed Clerk's Office, United States District Court, Feb. 4, 1910. John L. Gay, Clerk of the Court. By A. M. Bacon, Deputy.

196 In the United States District Court for Porto Rico.

ANN ELIZABETH BIRCH, ERNEST VICTOR BIRCH
VS.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Ann Elizabeth Birch and Ernest Victor Birch, and Wilcox and Sweet, their Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, within sixty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the United States District Court for Porto Rico, wherein the American Railroad Company of Porto Rico is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 4th day of February, A. D. 1910, and of the Independence of the United States the one hundred and thirty-fourth.

[Seal United States District Court for the District of Porto Rico.]

B. S. RODEY,
United States District Judge for Porto Rico.

Attest:

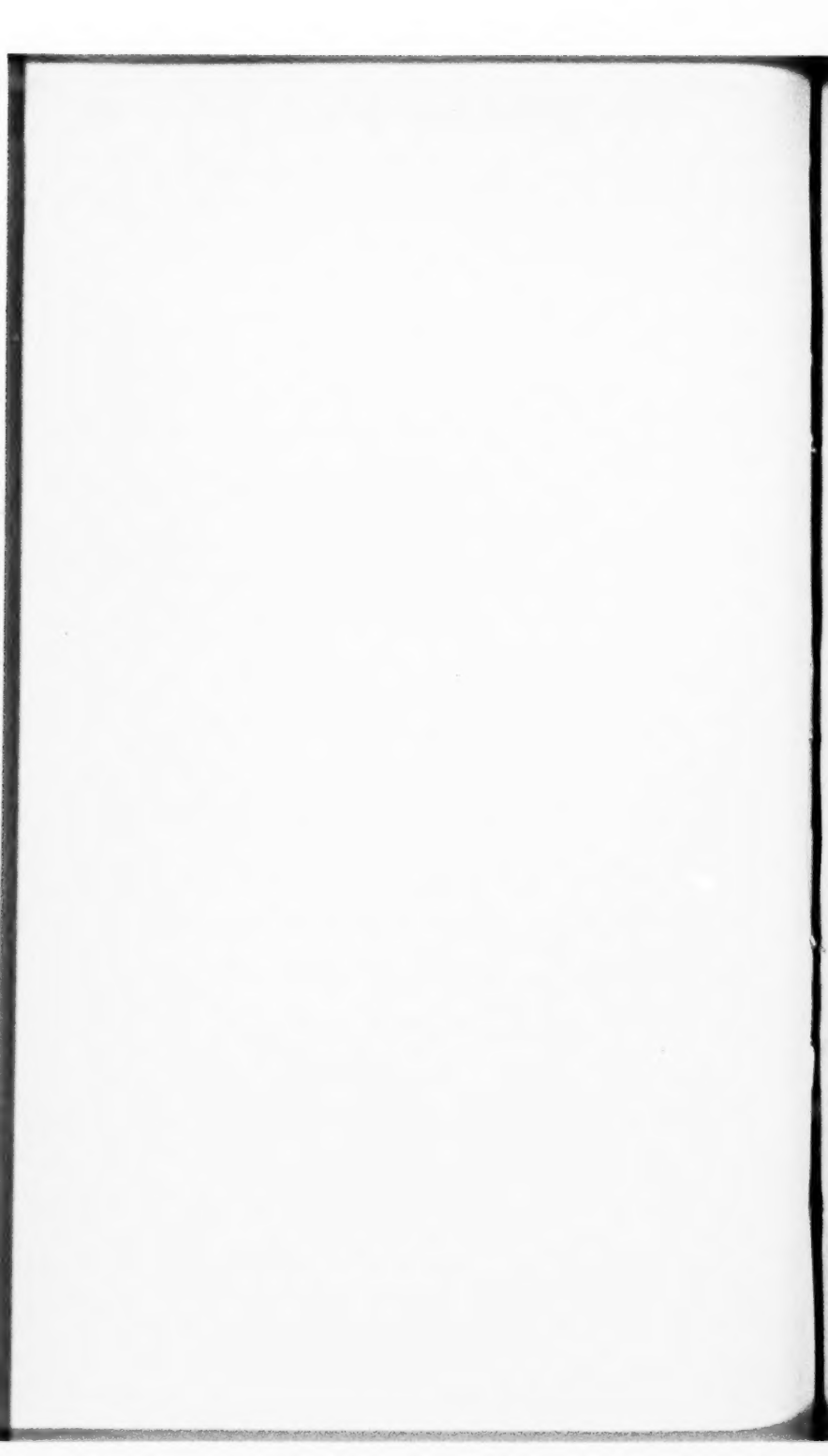
JOHN L. GAY, *Clerk.*

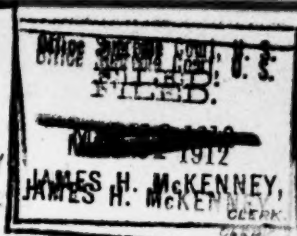
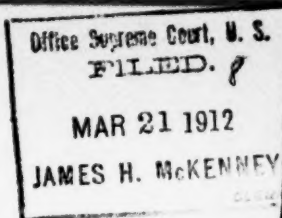
Service of above with copy of same acknowledged this 4th day of February, 1910.

WILLIS SWEET,
Of Counsel for Plaintiff.

197 [Endorsed:] U. S. District Court for P. R. Ann E. Birch
et al. vs. Am. R. R. Co. of P. R. Citation. 2/4. Filed
Clerk's Office, United States District Court, Feb. 4, 1910. John L.
Gay, Clerk of the Court. By A. M. Bacon, Deputy.

Endorsed on cover: File No. 22,055. Porto Rico D. C. U. S.
Term No. 224. American Railroad Company of Porto Rico, plain-
tiff in error, vs. Ann Elizabeth Birch and Ernest Victor Birch.
Filed March 8th, 1910. File No. 22,055.





SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 224.

AMERICAN RAILROAD COMPANY OF PORTO RICO.

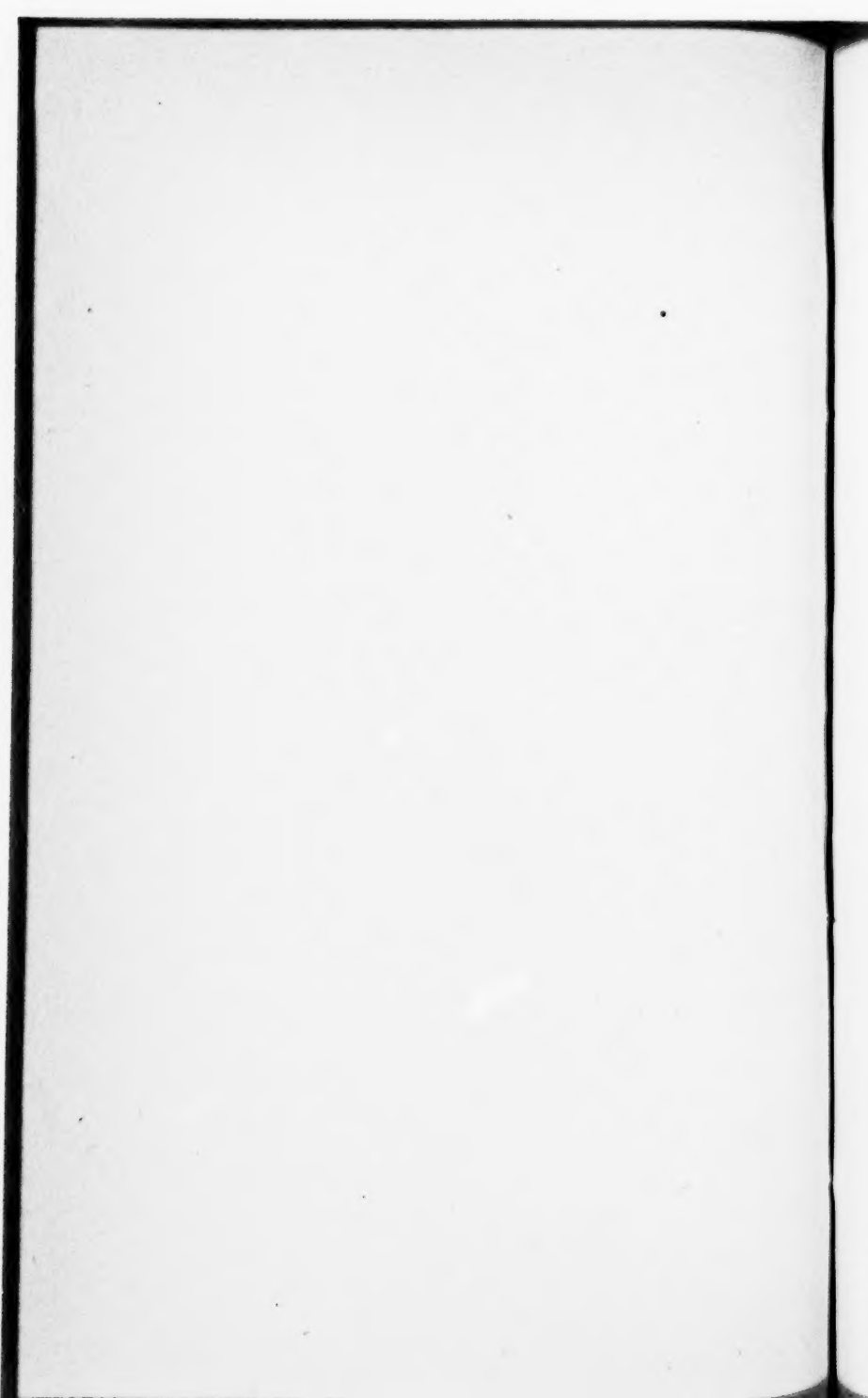
PLAINTIFF IN ERROR,

vs.

ANN ELIZABETH BIRCH.

BRIEF FOR PLAINTIFF IN ERROR.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Attorneys for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 224.

**AMERICAN RAILROAD COMPANY OF PORTO RICO,
PLAINTIFF IN ERROR,**

vs.

ANN ELIZABETH BIRCH.

Statement of Case.

Suit was brought by the defendant in error in the District Court of the United States for Porto Rico, under the Federal Employers' Liability Act of 1908, to recover damages from the plaintiff in error (hereinafter called the company) because of the death of her husband, Francisco Abraham Birch, a brakeman employed by plaintiff in error, alleged to have been caused by its negligence on April 2, 1909, within the island of Porto Rico. The original complaint (printed Record, pp. 1, 2) was by order of the court amended in several particulars (pp. 4, 5), among others by the addition of the son of the deceased as a party plaintiff. But as the verdict of the jury was in favor of plaintiff in

error as against him, no further notice need be taken of the presence of the son in the record.

In the amended complaint, as in the original, no allegation was made that any administration had been taken out on the estate of the deceased or that either plaintiff was his personal representative; but on the contrary defendant in error was alleged simply to be the widow of the deceased, and brought her suit in that capacity.

A demurrer had been interposed to the original complaint (p. 3), and by permission of the court the same was considered, after amendment of the complaint, to have been interposed to the complaint as amended (p. 8), and in that aspect was overruled. The company then answered (pp. 6, 7), admitting the death of plaintiff's husband in the line of his employment but denying the acts of negligence alleged against the company, and affirmatively alleging that no administration had been taken out upon the estate of the deceased.

Trial was had in December, 1909, which resulted in a verdict against the company and in favor of Ann Elizabeth Birch alone for the sum of \$2,000 (p. 10), upon which judgment was duly entered, the verdict being in favor of the company as against the son. From such judgment in favor of the widow personally this writ of error has been brought.

Certain errors were assigned at the time of suing out said writ of error and made a part of the record in the court below (p. 13), from which we select the following in substance as the errors to be relied upon in the argument which follows:

Assignment of Errors.

First, that the court below erred in overruling the demurrer of the company to the amended complaint.

Second, that the court erred in denying the motion made on behalf of the company to dismiss the suit or to direct a verdict on the ground that it had not been brought by the personal representative of the deceased, as required by the statute upon which it was based.

Third, that the court erred in holding that the heirs of deceased could sue in their own names and as heirs under said statute.

Fourth, that the court erred in refusing to give the following instruction requested by defendant:

“That the court instruct the jury that the Federal act with regard to safety appliances has no application to the question at bar.”

Fifth, that the court erred in refusing to give the following instruction requested by defendant:

“That they are entitled to recover the actual compensation that they would have received if he had not been killed, and that would be limited to the purchase of an annuity for his recognized period of life.”

ARGUMENT.

Although the judgment below was less than \$5,000, we think it clear that this court has jurisdiction of our writ of error under section 35 of the act of Congress of April 12, 1900 (31 Stats at L., 77, 85), which regulates appeals and writs of error from the District Court of the United States for Porto Rico to this court. That section reads as follows:

"That writs of error and appeals from final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States or a treaty thereof, or an act of Congress, is brought in question, and the right claimed thereunder is denied"; etc.

The present case comes under both the subdivisions specified. In the first place, if this case came from the Supreme Court of one of the Territories referred to, the writ of error would lie, because the jurisdiction of the court below did not depend upon the character of the parties but upon the character of the cause of action as arising under a law of Congress (the Employers' Liability Act of April 22, 1908). Hence, not being "a patent, revenue, or criminal case, nor one in which the jurisdiction of the court below depended entirely upon the opposite parties" having certain citizenship, it would not be one in which the judgment of a circuit court of appeals, if the writ had been sued out from a territorial supreme court to that court, would be final and therefore would be appealable to this court.

Royal Insurance Co. vs. Martin, 192 U. S., 149, 159

In the second place, as the plaintiff's claim was based upon an act of Congress and as the defendant made a contention by demurrer and by motion for non-suit (p. 79) that plaintiff was not the party authorized by that act to sue, which was overruled by the court, it thus "claimed a right under a statute of the United States which was denied." Wherefore "this court has jurisdiction to review the judgment."

Serralles vs. Esbri, 200 U. S., 103, 109.

I.

Right of Action Limited by the Statute to "Personal Representative" of Deceased.

The second section of the Employers' Liability Act, upon which plaintiff expressly based her action by paragraph V of her amended complaint (p. 5), provides that "every common carrier by railroad in the * * * possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier * * * or, in case of the death of such employee, *to his or her personal representative* for the benefit of the surviving widow or husband and children of such employee;" etc.

By paragraph I of her complaint, as amended (p. 4), plaintiff alleged that she was the widow of the deceased and she and her son his only heirs, and she demanded the recovery in her character as widow. By ground V of defendant's demurrer to the original complaint (p. 3), which was allowed to stand as a demurrer to the complaint as subsequently amended (p. 8), the company distinctly raised the question of her right to sue in that capacity under that statute; and by paragraph VII of its answer denied that any administration had been taken out upon the estate of the deceased (p. 7). Then, at the close of plaintiff's evidence (p. 79), and again at the close of all the evidence (p. 101), counsel for the company asked that a verdict be di-

rected for defendant upon the ground, among others, that "the suit is not brought by any person authorized under the national employers' liability act to bring such a suit." Thus the construction of the provision of the statute above quoted was directly challenged.

In denying the motion to direct a verdict the court below stated its reason as respects this particular ground as follows (p. 80):

"For the reason that, the suit being brought under the act of Congress of April 22, 1908, it is properly brought in the name of the only persons for whose benefit any recovery could be had, and it is the opinion of the court that the words used in section two of the act in question, 'to his or her personal representative,' cannot be construed to mean that it is necessary, in cases where only the husband or wife could inherit and are the only survivors, that they be forced in the absence of any estate belonging to the deceased other than this right to sue, to have an administrator appointed."

While this reasoning might be persuasive were the terms of the statute ambiguous or less clear, we submit that clear and positive provisions of statutes of this kind cannot be thus ignored or contravened. While the purpose of the statute is doubtless remedial and it is to be given a liberal construction consistent with its terms to effectuate that purpose, there is no place for "construction" in the technical sense because of the absence of ambiguity. This court has many times stated the considerations which must govern:

"The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reason which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the

act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."

Hamilton vs. Rathbone, 175 U. S., 414, 419.

"Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress as thus plainly expressed."

Dewey vs. United States, 178 U. S., 510, 521.

Therefore, when Congress specified that railroad companies as common carriers were to be "liable * * * to his or her personal representative," the courts must presume that Congress had reasons for making such provision and, it involving "no absurdity or contradiction," they must "give effect to the will of Congress as thus plainly expressed."

The record shows that when suit was first begun neither letters of administration nor a declaration of heirship had been obtained (p. 18), and that the latter was obtained after the suit was begun and admitted in evidence at the trial. Letters of administration might as easily have been obtained, and the course pursued seems to have been the deliberate choice of counsel—not a matter of inconvenience or difficulty.

It may well be that, in selecting the personal representative instead of the heirs of the deceased or the specified beneficiary as the proper party to bring the suit, Congress intended to mark the logical distinction between providing for the survival of a cause of action existing in the in-

jured party up to the time of death and for the creation of a new cause of action arising in the representative from the moment of death. At least that it does create a new cause of action seems plain.

Fulgham vs. —, 104 C. C. A., 151.

Walsh vs. N. Y., N. H. & H. R. Co., 173 Fed. Rep., 494.

While we have found no decision of any Federal court construing this very statute since its enactment, decisions upon similar statutes are very pertinent.

Lake Erie R. Co. vs. Charman, 161 Ind., 95.

Louisville, etc., Co. vs. Trammel, 93 Ala., 350.

Cleveland, etc., R. Co. vs. Osgood, 73 N. E. Rep., 285.

The case first above cited involved a statute of Indiana whose provisions as to the party to bring suit and the beneficiaries were identical with those of this statute of Congress, and in fixing its requirements the Supreme Court of Indiana said:

"The action given by section 285, Burns Rev. St., 1901, is the creation of a new and independent right (152 Ind., 412). When a new right is created by statute and a mode prescribed for its enforcement, that mode must be pursued, to the exclusion of all others (104 Ind., 461; 25 Ind. App., 157). The legislature, for reasons of its own, designated the personal representative of the deceased, which is understood to be the administrator of such deceased person's estate, as the only person competent to prosecute an action under said section. It doubtless had in view cases where there should be a failure of widow and children, or where the beneficiaries should be minors or numerous, and as a matter of convenience deemed it expedient to provide for the prosecution of such actions by a trustee for the use of the persons entitled. The designation of the personal

representative of the deceased as such trustee would seem to have no other significance than is implied from the fact that such officer is convenient and usually selected for his probity and friendly relation with the family of the deceased. * * *

"So we conclude that the general administrator of the estate of a decedent is the personal representative of such deceased person within the meaning of section 285, *supra*, and the only proper plaintiff in the action given by said section."

The *Osgood* case, *supra*, is a decision of the Appellate Court of Indiana, rendered a little later than the above decision of its Supreme Court, wherein the appellate court says:

"The right to maintain the action is vested in the personal representatives of the deceased. Had the provision gone no further the fund recovered would have been simply assets of the estate, to be disposed of as other assets. The legislature, having the right to determine what disposition should be made of the fund, charged it with the express trust that it must inure to the benefit of the widow and children, if any, first, and if no widow or children, then to the next of kin (citations). The action is brought by the administrator in his representative capacity (citations). The widow, children, and next of kin are not parties, have no right to be parties, and have no right to compromise or control the action."

A Federal circuit court, speaking of a similar State statute, said:

"The action is not brought by him individually, but in his representative capacity as administrator of Wells' estate. Under the express provisions of the statute the action must be brought by the representative of the deceased, and he alone is entitled to recover damages, if any, resulting from the death of Wells by the wrongful act of the defendant—not for his own individual benefit, but for the benefit of

those to whom the damages recovered are to be distributed as provided for in the second section of the act."

Peers vs. Nevada P. L. & W. Co., 119 Fed. Rep., 400.

It is thus seen that the provision placed by Congress in the statute under consideration was not a new departure, but was the adoption of a policy already fixed in the laws of several of the States, hence it is logical to presume Congress had in mind the construction given to these similar provisions of the State statutes.

Cases involving liability for death by wrongful act under State statutes have several times come to this court, but in each case, so far as it has come to our notice, the party suing has been the one designated by the particular statute and no contention upon that point has been brought here for determination.

Illinois C. R. Co. vs. Barron, 5 Wall., 90.

Sou. Pac. Co. vs. Tomlinson, 163 U. S., 369.

Stewart vs. B. & O. R. Co., 168 U. S., 445.

Chesapeake R. Co. vs. Dixon, 179 U. S., 131.

We therefore submit that there is neither reason nor precedent for violating the plain direction of the statute specifying the personal representative of the deceased as the only party authorized to bring suit under it, and that the contentions of plaintiff in error in that regard should have been sustained and the suit dismissed.

II.

National Safety Appliance Act Not in Force in Porto Rico.

In the charge of the court below to the jury upon the subject of contributory negligence appears the following limiting clause (p. 103):

"But if you shall believe from a preponderance of the evidence that the violation by the defendant of the law of Congress requiring it to have safety appliances upon its trains and cars contributed to the death of the deceased, or was the proximate cause thereof, then you cannot hold that the deceased was guilty of any contributory negligence at all under the law, nor can you hold that the deceased assumed any risks of his employment, if you shall thus believe that the absence of safety appliances in and about the train contributed to, or was the proximate cause of, the injury."

At the close of the charge and while the jury were in the box counsel for the company made the following request (p. 104):

"For the purposes of the record, I wish to request the court for a further instruction: That the court instruct the jury that the Federal act with regard to safety appliances has no application to the question at bar."

To which the court replied: "You have your point saved on that already," and refused the request.

It is therefore to be determined whether the safety appliance act of Congress is in force in Porto Rico. The original act of March 2, 1893 (27 Stats. at L., 531), applied only to "carriers engaged in interstate commerce by railroad," but in 1903 an amendment was adopted (32 Stats. at L., 943)

extending its application to "common carriers by railroads in the Territories and the District of Columbia."

We believe the uniform wording of the legislation by Congress since the acquisition of Porto Rico shows that the latter has never been intended to be included within the word "Territory" when used in its ordinary sense. Take, for example, the language of section 35 of the civil government act, quoted at the beginning of this brief, which was the first law enacted by Congress for that island. It provides for writs of error and appeals "in the same cases as from *the supreme courts of the Territories* of the United States"-- language which clearly indicates that "the Territories" was a phrase well understood and defined and referred only to the Territories fully organized and incorporated within the United States. If Congress had intended that Porto Rico should be regarded as by said act organized into such a "Territory," it would naturally have added the word "other" so as to have it read "from the supreme courts of the other "Territories." Moreover, a careful reading of that whole act brings a conviction to the mind that the use of the word "Territory" or "territorial" with reference to the government thereby created for Porto Rico was carefully and intentionally avoided from its title to its ultimate word.

Again, the original Employers' Liability Act of 1906 described its field of operation as railroads "engaged in trade or commerce in the District of Columbia, or in any Territory of the United States * * * or between any Territory and another, or between any Territory or Territories and any State or States or the District of Columbia," etc. This was evidently not intended to apply to Porto Rico, because when the new act of 1908 was drawn and it was desired so to extend it a new section was inserted (section 2) applying its provisions to "common carriers by railroad in the Territories, the District of Columbia, the Panama Zone, or other possessions of the United States, thus still preserving the distinction in legislative intent between "Territories"

and "possessions," that is, between Territories incorporated into the United States and territory not so incorporated.

It is true that in *New York ex rel. vs. Bingham*, 211 U. S., 468, this court in the closing paragraph of the opinion delivered by the Chief Justice suggested that it might "be justly asserted that Porto Rico is a completely organized territory, although not a territory incorporated into the United States" (p. 476); but such a declaration was not necessary to the decision, as the conclusion reached had been based upon a statute of the United States enacted long *before* the acquisition of Porto Rico and its applicability to the government established for that island by virtue of section 14 of the civil government act whereby it is provided that "the statutory laws of the United States not locally inapplicable * * * shall have the same force and effect in Porto Rico as in the United States," etc. Moreover, the Chief Justice was careful to preserve the distinction between territory incorporated and unincorporated.

We submit, therefore, that the safety appliance acts of Congress have not been made applicable to Porto Rico, and that by directing the jury to make such application, thereby depriving the company to that extent of the benefit of contributory negligence on the part of the deceased, and by refusing the instruction requested on behalf of the company to remedy and correct the instruction so given, the court below committed error prejudicial to its interests.

III.

Instructions as to Measure of Damages Erroneous.

Those extracts of the charge of the judge given of his own motion on the subject of damages are as follows:

"The liability of the defendant in any event in this case cannot be other than compensatory" (p. 102).

"The measure of damages in this case, gentlemen,

is the amount which you believe on a preponderance of the evidence the plaintiffs, or either of them, necessarily lose in or by the death of their husband and father, and in measuring this damage you may take into account the age and health and expectancy of life of the deceased, his earning capacity, his character, his mode of treatment of his family and the amount contributed out of his wages to them for their support, and calculate from these facts the amount which you as reasonable and practical men believe the plaintiffs lose because of the death" (p. 102).

"If you should find for the plaintiffs, or either of them, the damages cannot go beyond the amount claimed in the complaint, and the court warns you, as stated, that the law is merely compensatory and that in no manner is the jury authorized to give speculative damages of any sort in such a case" (p. 103, bottom).

The request of counsel for the company was that the instructions on that subject be modified so as to read:

"That they are entitled to recover the actual compensation that they would have received if he had not been killed, and that that would be limited to the purchase of an annuity for his recognized period of life" (p. 104).

As the verdict was in favor of the Company so far as the claim of the son was concerned, we need only consider this question as affecting the rights of the widow.

We submit that the instructions given by the court did not sufficiently make plain to the jury that their verdict must be confined to the *actual pecuniary loss* suffered by the plaintiff from the death of her husband. The specification of the court that the jury might consider "his earning capacity, his character, his mode of treatment of his family" as well as "the amount contributed out of his wages to them for their support" indicated to the listening jurors that these were distinct matters for which recovery might be had, not

that they were dependent considerations from which to arrive at "the amount they would have received from him had he not been killed, which reduced to its present worth, is the true measure under this and like statutes.

The clearest statement of the rule we have been able to find is in the case of *L. & N. R. Co. vs. Trammell*, 93 Ala., 350, where the court says:

"The true measure of damages manifestly is that which gives her such sum as, being put to interest, will each year, by taking a part of the principal and adding it to the interest, yield \$150, and so that the whole remaining principal at the end of the twenty-seventh year, added to the interest on this balance for that year, will equal \$150. This sum we find to be approximately \$1,650."

The method there suggested seems to us the equivalent of purchasing an annuity as stated in the charge requested and refused. Giving the law as stated by the court its most favorable construction for the purpose of sustaining it, it lacks two elements held necessary in the case above cited: first, a limitation (in a family of husband and wife alone) to a maximum of one-half the income which it may be found the husband would have received; and, second, the reduction to the present worth of such amount, that is, the recognition of the fact that a present payment of a certain amount is equivalent to the payment of a considerably larger amount distributed over a number of future years.

See also, *Railway Co. vs. Morrison*, 93 Tex., 529.

It is evident that the jury, guided by the instructions of the court as they understood them, did not follow this method of computation. Plaintiff testified that her husband was forty-seven years old (p. 19), hence his expectancy of life was quite less than in the Trammell case. Plaintiff was rather vague as to the amount of which she received the benefit (pp. 22-27), but the pay-rolls of defendant com-

pany were introduced, from which it appeared that his regular pay was \$25 per month, some extras being allowed but only for expenses actually incurred during his trips for sustenance (p. 85), so that the income was practically identical with that used as a basis in the Trammell case; hence the resultant amount of recovery would have been considerably less than the \$1,650 found in that case.

If the charge requested by defendant Company had been given, the right of plaintiff would not have been infringed, yet those of defendant would have been protected from exaggerated computations.

For the reasons herein presented we submit that the judgment of the court below should be set aside and the case remanded with directions to dismiss the complaint, or at least to grant a new trial.

Respectfully submitted,

N. B. K. PETTINGILL,

F. L. CORNWELL,

Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1911.

No. 224.

WILLIAM SWANN
FILED

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JAMES H. BROWN

American Railroad Company of Porto Rico,

Plaintiff in Error,

vs.
Ann Elizabeth Birch and Ernest Victor Birch.

Brief for Defendants in Error.

WILLIAM SWANN

Attorney for Defendants in Error

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 224.

American Railroad Company of Porto Rico,

Plaintiff in Error,

vs.

Ann Elizabeth Birch

and Ernest Victor Birch.

STATEMENT.

This action was brought by Ann Elizabeth Birch, and Ernest Victor Birch, hereinafter designated as plaintiffs, against the American Railroad Company of Porto Rico, hereinafter designated as defendant, said action having been brought to recover damages of and from the defendant company, because of the death of Francisco Abraham Birch, husband of said Ann Elizabeth Birch, and father of said Ernest Victor Birch. Negligence on the part of the defendant corporation, resulting in the death of said Birch, was the basis of the action.

As stated by the court in the instructions, (R. p. 103, f. 184), this was the first action tried in Porto Rico under the Congressional Employers' Liability Act; and we will be frank enough to add that it was also the first experience of the attorneys for plaintiffs, under the same act. We did not, at the time of preparing the complaint, know that the plaintiffs must specify in their complaint that the action was brought under the national act, (and some courts hold that it is not necessary), to the end that the court might understand that we relied upon the national act, and not upon the remedies afforded by local legislation. But this situation was developed by the discussion of the demurrer. The discussion of the demurrer also directed our attention more carefully to the provision in sections 1 and 2 of said

act (the "Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908), providing that in case of the death of such employee, action should be brought by his or her personal representative," etc. This court, in the case of *Garzot et al vs. María Rios*, 209 U. S. 283, held that the United States District Court of Porto Rico was without jurisdiction to act in Probate matters, and this view left us somewhat in the air, as we had in fact brought the action in the name of the widow, as the local statute authorized us to do. This statute is as follows:

Civil Code of Porto Rico, Section 1803. "A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

And Section 61, Code of Civil Procedure, is as follows:

"Section 61.—When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, etc."

By virtue of an act passed at the fifth session of the legislature of Porto Rico, Chapter III, page 140 of the session laws, provision is made for "Declaration of Heirship;" the purpose of the act being to have a judicial declaration of the legal heirs of a deceased person. This was the proceeding followed by us, (as will appear later), and is a common practice in Porto Rico. The Probate court having settled the question of heirship, we are permitted to bring suit as proper parties.

The question of the application of the Safety Appliance Act, (27 Stat. L. 531) to the case at bar was the only other question seriously contested by defendant. Indeed, we may say, the only question seriously contested at the trial, as the "capacity to sue" was questioned, decided and excepted to without extended discussion.

The cause was tried by jury, and on the 15th day of December, 1909, a verdict was rendered in favor of plaintiff in the sum of \$2,000, judgment was entered thereon in favor of plaintiff, and thereupon, the defendant appealed to this Honorable Court from the said verdict and the said Judgment.

ARGUMENT.

In his brief for defendant, counsel has eliminated the exceptions presented in the record with the exception of three: (a) the right of the defendant to an appeal in this case, the judgment being under \$5,000.00; (b) that this court has appellate jurisdiction because a right given to the defendant by a statute of the United States was denied in the lower court; and, (c) that plaintiffs were without capacity to sue.

As to the right of an appeal in this case, the only question is, whether "the Constitution of the United States, or a treaty thereof, or an act of Congress, is brought in question, and the right claimed thereunder is denied."

We make no contention with counsel as to the law or its meaning. But we do ask in all seriousness what right was denied defendant in the lower court. We are unable to see wherein the case of the Royal Insurance Company vs. Martin, 192 U. S. 149, (cited by counsel) is applicable. In that case Martin, a merchant in Porto Rico, and the owner of a building and a considerable stock of merchandise therein, caused the same to be insured in the Royal Insurance Co., a British organization, as follows: on the building, a policy for £700; and on the stock of goods therein a policy for £900. The total insurance, then, held by Martin against the company, amounted to the sum, approximately, of \$8,000.00. The first policy was issued to Martin on the 12th day of March, 1877, he being at that time the sole owner of the building and of the goods contained therein. The policy was renewed from year to year, the last one being dated March 12, 1898, and extending until March 12th, 1899. In August, 1899, the property was destroyed by fire. In the meantime, Francisco Martin, the party insured, had transferred the stock of merchandise in said building to his two sons, and they had become the exclusive owners thereof; but the ownership of the building continued in Martin.

A clause in the insurance policy provided that the risk should not be transferred without notifying the company, thus giving it the right to take whatever steps it might deem necessary in view of the new relation it was called upon to assume. Leaving out further details, it is sufficient to say that suit was brought by the executor of Martin for the full amount of both policies, besides

damages. The court refused to permit the jury to segregate the claims; that is to say, the loss incurred by the destruction of the goods, and the loss resulting from the destruction of the building. The jury rendered a verdict in favor of the plaintiff, for the sum of \$7,623.00, the plaintiff having been Ruperto Martin, the executor of the estate of Francisco Martin.

The opinion of this court was delivered by Mr. Justice Harlan. In the third paragraph of the opinion, he uses the following language: "The defendant in error disputes the jurisdiction of this court to review the judgment below."

As the judgment was for more than \$5,000.00, besides interest and costs, we cannot conceive upon what ground the jurisdiction of this Court was questioned in that case. Certainly neither the Constitution of the United States, nor a treaty, nor a statute, or any right thereunder, was involved. The jurisdiction of the lower court, depended upon diverse citizenship and the amount in controversy; and of this court upon the amount in controversy.

The other case cited by counsel, *Serralles vs. Esbri*, 200 U. S. 103, did involve the right of the plaintiff in error under a United States Statute. The facts briefly stated were these: The plaintiff in error had purchased from the defendant a certain tract of land situated in Porto Rico, some three or four years prior to the transfer of the island to the United States. The agreed price for the land was 18,000 pesos with interest thereon at the rate of 10% per annum; and the principal and interest were to be paid in currency of the value of that in circulation at the time the contract was made, regardless of future changes in coinage. Whether more than one payment was made on the basis contended for by the grantee is not clear, but it is enough to say that after the transfer of the island to the United States, and the Foraker Act became the Organic Law of Porto Rico, the purchaser tendered the amount due in United States money at the ratio of sixty cents for each peso due, this having been the ratio fixed by the Foraker Act, the theory of the debtor being that he was paying the exact amount called for by the contract, to wit, the value of the peso which he agreed to pay. The grantee contended that one dollar in United States currency should be paid for each peso due.

The question was passed upon by the District and Supreme Courts of Porto Rico, and by the decision of both courts, the con-

ention of the grantee was sustained, and Serralles, the plaintiff in error in the case cited, was required to pay one dollar for each peso due. He appealed to the Supreme Court of the United States, claiming that under Section 11 of the Foraker Act, the conclusion reached by the Supreme Court of Porto Rico was erroneous.

Here a substantial right, one that seriously affected the parties to the action clearly involved the construction of a United States statute, viz, Section 11 of the Foraker Act. In such a case the construction of the statute was the issue involved, and not the amount, hence, the writ of error would lie. As the defendant in the case at bar has not been deprived of any right, and as neither the constitution, nor a treaty, nor a *right of defendant* under any United States Statute has been questioned, we do not believe the cases cited applicable, nor the assignment well founded in law.

Capacity of Plaintiffs to sue under the Statute.

The following questions and answers appear at page 32 of the transcript, folio 57.

Q. Mrs. Birch, what property, if any, did your husband have aside from his salary as brakeman?

A. Nothing else.

The Court:

Q. No estate of any kind?

A. No.

Counsel's contention is that plaintiffs should have gone through the farce of having an administrator appointed, when there was not one dollar in the world, real or personal, to be administered. Let us see:

What is the purpose of the provision of the law permitting a "personal representative" to bring the action? Undoubtedly, as counsel suggests, to keep alive the cause of action in the event the injuries received by the employee prove fatal; for ordinarily, the cause of action would die with the employee. It was, then, the beneficial purpose of Congress to protect those dependant upon the employee, as well as the employee himself. Hence, the proviso that "a personal representative" might act in the place of deceased for the benefit of those surviving him dependant upon him for support, and within the degree of relationship fixed by the act.

But this was not the only purpose of this act, as we view it. It would be the right of the company defendant to have its liability, if liability there was, determined by the one action. If, therefore, an administrator were appointed by the court, or an executor were provided, and by either of these representatives of an estate, or of the heirs, an action was brought, it would determine the rights of the heirs, and all of them, as against the company. This is a right of the defendant, in our opinion, guaranteed by the statute, and the defendant could not be "construed" out of that right. Was such a right denied, or taken from the defendant? Absolutely not. This trial must determine and forever settle the rights and wrongs involved in the death of Birch. The record on the subject (R. p. 8. f. 18) is as follows:

"Whereupon counsel for the plaintiffs present a certificate from the proper Insular Court in which it is certified that plaintiffs herein, Ann Elizabeth Birch and Ernest Victor Birch, are the legal heirs of the deceased Francisco Birch. Counsel for the defendant objects to the admission of said certificate, *on the ground that the same was issued by the Insular Court since the filing of this suit.*" (Italics are ours). "After hearing counsel in that regard, the court admits said certificate and rules that the mother and son having been declared by a competent court to be the only heirs of the deceased, that they are competent to bring this suit in their own names without the necessity of having a personal representative or administrator appointed for that purpose."

What difference could it have made to the defendant if John Doe (as administrator of nothing) had been named as plaintiff; while the actual plaintiffs, as in this case, were present, and John Doe absent, and the whole proceeding, as shown by the certificate from the Insular Court, was carried on for the benefit, and the exclusive benefit of plaintiffs? And provided further, that all parties, making further litigation impossible, were before the court? In what possible way could the defendant have been deprived of any right, depending upon the construction of a United States statute?

It is urged in counsel's brief that the course taken by plaintiffs was the deliberate choice of counsel for plaintiffs, when the routine of obtaining an administrator could have been as easily followed. Subdivision 4, of Section 1, Chapter III, Laws of Porto Rico, 1905, p. 140, is as follows:

"The Judge to whom the petition has been presented, *in the briefest period possible*, shall hear the proof presented, and from the result thereof shall issue the proper order. Said order shall be issued without prejudice to a third party, unless it relate to heirs at law."

The italics above are ours. This provision emphasizes the difference between the proceeding under the chapter presented, and the long, and more or less expensive process of having an administrator appointed; an officer who, notwithstanding there is not a penny in the world for him to administer, must give bond for something he *may* receive on a law-suit, and whose appointment, with all costs and compensation for his services, must be considerable. Cutting out the time necessary for the administrative proceedings, and still we shall be nearly, if not quite, three years in receiving the small amount given by the jury to this plaintiff.

In adopting the practice followed, we were in perfect accord with the method known to both the Insular and Federal Courts of Porto Rico, when probate action is necessary in some form, either to determine the necessary parties to an action, or before litigating any question requiring the disposition of the interests of heirs, or who they are, by probate proceedings. If, therefore we did not take from defendant some *right*, given it by the United States Statute, its objection in this court is not fatal.

Even though the Lower Court erred, it is not cause for reversal.

But even though the court erred in holding that the plaintiffs had "capacity to sue," it is not, we submit, reversible error in this case, *in the absence of a right taken from defendant*, and the judgment being under five thousand dollars. Whether or not the error, if error it was, would have been fatal had the judgment exceeded five thousand dollars, we need not discuss.

Is the National Safety Appliance Act in Force in Porto Rico.

The Court instructed the Jury in accordance with the provisions of the Act of April 22, 1908, (*supra*) as follows:

"but if you shall believe from a preponderance of the

evidence that the violation by the defendant of the law of Congress requiring it to have safety appliances upon its trains and cars, contributed to the death of the deceased, or was the proximate cause thereof, then you cannot hold that the deceased was guilty of any contributory negligence at all under the law, nor can you hold that the deceased assumed any risks of his employment, if you shall thus believe that the absence of safety appliances in and about the train contributed to, or was the proximate cause of, the injury."

The foregoing instruction was given under the following sections of the law of 1908:

Section 3 of said act provides that contributory negligence shall not bar a recovery by the employee, if injured, "or where such injuries may have resulted in death,"***"but the damages shall be diminished by the Jury in proportion to the amount of negligence attributable to such employee;" and now comes the binding proviso:

"*Provided*, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the *violation by such common carrier of any statute* enacted for the safety of employees contributed to the death or injury of such employee."

"Section 4.—That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The act of 1908, under which this action was brought has for its purpose, and for its exclusive purpose, the further protection of employees of Railroad companies. If it did not refer to the safety appliance act, what could have been the object of using it in this statute; that it must have referred to the safety appliance act cannot be doubted after reading the following from Section 1 of said act of 1893:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroads to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

This statute is quoted from the Federal Statutes Annotated, Vol. 6, page 752.

Among the annotations declaring the purpose of that statute to have been for the protection of the employee is the case of Chicago M. & St. P. Ry. Co vs. Voelker, Circuit Court of Appeals, Eighth Circuit, found at page 522, Federal Reporter, the quotation following being taken from page 527:

"Obviously," said the Court, "the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy."

It is obvious that the statute was so intended, because it says so. The judgment given defendant in error by the lower court was reversed because the trial court refused to instruct the jury to consider the question of contributory negligence, a refusal which the appellate court held erroneous and therefore ordered a new trial. But that the statute requiring safety appliances was enacted for the protection of employees there can be no doubt.

The case above referred to was heard on appeal in 1904; had the same question arisen under the act of 1908, it is probable that the decision of the Circuit Court of Appeals would have been different.

The act of 1908 is very drastic in its terms. It does away entirely with the old principle of the common law that if the person injured was guilty of contributory negligence he could not recover at all, and that if the jury find that the person injured or killed was guilty of contributory negligence, he must, nevertheless, have judgment, the jury subtracting from the full sum to which he would

be entitled a sum in "proportion to the amount of negligence attributable to such employee."

Then came the radical determination of Congress to force all railroad companies subject to the law to adopt the safety appliances called for by the act of 1893. Porto Rico is brought within the terms of the act by direct provision. And how can the act mean less than that the safety appliance act is applicable in Porto Rico when Congress declares in language as broad as could be employed, that under this act of 1908, contributory negligence shall not be permitted as a defense by any railroad company that has failed to adopt those appliances.

Furthermore, in the trial of this cause no contributory negligence was shown on the part of the deceased. He was at his post on top of the car when the accident happened and attempted for several hundred yards to stop the train. He had practically succeeded in doing this when the car upon which he was riding left the track. We repeat, that in fact contributory negligence did not and could not enter seriously into this case, even if the safety appliance act did not apply. Therefore, the instruction complained of could not injure the defendant, and hence the exception is without force, and the assignment without merit.

The Measure of Damages.

The last exception urged by plaintiff in error refers to the instruction given by the court governing the measure of damages. A party will not receive consideration in the appellate court, as we understand the rule, when the error complained of did not do him any injury. If the plaintiff in this case recovered too much under a verdict for two thousand dollars, then it was not worth while to give her anything.

The defendant asks a new trial. The plaintiff offered a new trial before the bill of exceptions was settled or the bond given. This offer was declined (R. p. 22, p. 12, Folio 22).

It is not a case in which the plaintiff under the facts could expect a very large judgment because of the age of the deceased, forty seven years. But the evidence shows that Birch was a very powerful man. He was entitled to the full extent of his expectancy, which in this case we estimated at thirteen years.

The Superintendent of a portion of the division covering the run of the deceased gave from the records of the company the salary and allowances paid to deceased. For the first two weeks of January, 1909, Birch received twelve dollars and a half for wages; allowance for expenses when absent from home, five dollars and forty cents and one dollar for uniform, making a total of eighteen dollars and ninety cents or thirty seven dollars and eighty cents per month. (R. P. 85).

Mrs. Birch testifies (R. p. 26), that deceased gave her on the fifteenth and on the last of each month fifteen or sixteen dollars and that with that money she paid the living expenses of the family. She also stated that when Birch purchased clothes this amount was reduced to twelve or thirteen dollars twice each month (R. p. 24). She also testified that he paid the house rent aside from the money that he gave her, amounting to six dollars and a half per month. (R. p. 24).

The Alabama case cited by counsel is not available to us in the short time at our disposal in which to answer defendants brief; so the quotation from the Alabama decision, without the environments, conveys little information. But we submit that the instruction as to the measure of damages was correct; and if it was wrong they did not appear to have prejudicial the defendant. Under what we conceive to have been a correct measure of damages, the widow should have received approximately four thousand dollars.

We respectfully submit that the appeal is without merit, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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